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REPORTS OF CASES

DETERMINED IN

THE DISTRICT COURTS OF APPEAL

OF THE

STATE OF CALIFORNIA

C. P. POMEROY
REPORTER

RANDOLPH V. WHITING
ASSISTANT REPORTER

VOLUME 33

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N. P. CONREY, Presiding Justice.
W. P. JAMES, Associate Justice.
VICTOR E. SHAW, Associate Justice.

THIRD APPELLATE DISTRICT.

N. P. CHIPMAN, Presiding Justice.
ELIJAH C. HART, Associate Justice.
ALBERT G. BURNETT, Associate Justice.

(iii)

TABLE OF CASES—VOL. 33.

Agnew, Fiori v.....	284
Alden v. Mayfield.....	684, 724
Anglo-Pacific Development Co., Castro Point Railway & Terminal Co. v.	418
Application of Drennan	193
Application of Hines	45
Application of Smith	161
Arakelian, Luft v.....	463
Ash v. Superior Court.....	800
Avery Mill and Lumber Company, Officer v.....	719
Back Country Transportation Company, Potter v.....	24
Bailey v. Baker	452
Bailey Ornamental Iron Company v. Goldschmidt.....	661
Baker, Bailey v.....	452
Bank of Italy, Keeney v.....	515
Barbiere, People ex rel. Bradford v.....	770
Beall v. Bekins Van and Storage Company.....	652
Bekins Van and Storage Company, Beall v.....	652
Belmore Land & Water Company, Chambers v.....	78
Berlin Realty Company, Clark v.....	50
Birkel Company v. Lovell.....	744
Black v. Geyser Peak Wine and Brandy Company.....	805
Blaisdell, Southern Pacific Railroad Company v.....	239, 248
Blinn Lumber Company v. Cohn.....	386
Blum, Liljefelt v.....	721
Board of Trustees of Auburn School District, Sweeney v.....	381
Boos v. Byrnes	755
Boss v. Lewis.....	792
Bosworth, Willats v.....	710
Boutagy v. Schnierow v.....	836
Braun v. Vallade.....	279
Brinkley-Douglas Fruit Company v. Silman.....	643
Brodie, In re.....	751
Brooke v. Quigley.....	484
Bunnell v. Thomas.....	634
Byrnes, Boos v.....	755
California Fruit Canners Association, Matchette v.....	156
Call v. Jenner Lumber Company.....	310
Caner v. Owners Realty Company.....	479
Canfield, Young v.....	343

(v)

Carlini v. Louis Schultz Company.....	669
Castro Point Railway & Terminal Company v. Anglo-Pacific Development Co.	418
Chambers v. Belmore Land & Water Company.....	78
Chambers, Chenoweth v.	104
Chambers, County of Sacramento v.	142
Chenoweth v. Chambers.	104
Choate, Warden v.	354
City of Los Angeles, Consolidated Lumber Company v.	698
City of Los Angeles, Mono Power Company v.	675
City of Oakland, Foley v.	128
City of Petaluma and Thomas, In re.	547
City Properties Company v. Meacham.	696
Clark v. Berlin Realty Company.....	50
Clayton, People v.	357
Cohn, L. W. Blinn Lumber Company v.	386
Columbia Life & Trust Company, Goldstone v.	119
Compton Land Company v. Vaughan.....	130
Conklin v. Woody.	554
Connell Company v. Jenner.	350
Consolidated Lumber Company v. City of Los Angeles.....	698
Consolidated Lumber Company v. Superior Court of Los Angeles County	126
Cordes, Johnson v.	619
Countryman, Gabbs v.	385
County of Sacramento v. Chambers.	142
Cox v. San Joaquin Light & Power Company.....	522
Crawford, Shull v.	36
Crouse-Prouty v. Rogers.....	246
 Davies, E. A. Hardison Perforating Company v.	738
Davies v. Patton.....	713
Daugherty, Stephens v.	733
Dean v. Game.	722
Devenney, Maybury Ranch Co. v.	586
Dilger v. Whittier.	15
Doe Estate Company, Roebling Construction Company v.	397
Doolittle v. Savage Tire Company.	476
Drennan, Matter of Application of.	193
Dunfield, Manor v.	557
Dunn, Preston v.	747
 E. A. Hardison Perforating Co. v. Davies.....	738
Eddie v. Gage Manufacturing Company.....	338
Edgar Bros. Company v. Schmeiser Manufacturing Co.	667
Elliott v. Robbins.	577
Ellsworth v. National Home and Town Builders.	1
Employers' Indemnity Exchange, Pierce v.	98

Eng-Skell Company, Marvin v.....	42
Erbe, Keeley v.....	267
Estey, Squires v.....	287
Fairmont Creamery Company v. Los Angeles Ice & Cold Storage Company	
414	
Farias v. Farias.....	287
Fealy, People v.....	605
Fiori v. Agnew.....	284
First National Bank of Palo Alto, Palo Alto Mutual Building and Loan Association v.....	
214	
Firth, Simmons v.....	187
Fissel v. Monroe.....	756
Fodera, People v.....	8
Foley v. City of Oakland.....	128
Francis v. Independent Electrical Supply Company.....	482
Fred Medart Manufacturing Co. v. Weary & Alford Company.....	347
Gabbs v. Countryman.....	
385	
Gage Manufacturing Company, Eddie v.....	338
Game, Dean v.....	722
George J. Birkel Company v. Lovell.....	744
Geyser Peak Wine and Brandy Company, Black v.....	805
Gibson, People v.....	459
Gideon v. Howard.....	5
Gilbreth, People v.....	23
Goetz, Ward v.....	595
Goldschmidt, Bailey Ornamental Iron Company v.....	661
Goldstone v. Columbia Life & Trust Company.....	119
Gonzales, People v.....	840
Graca v. Rodrigues.....	896
Grandi, People v.....	637
Grotefend v. May.....	321
Haas, Schallman v.....	
28	
Hamilton v. Mallard.....	470
Hardison Perforating Co. v. Davies.....	738
Hawn, Kloster v.....	100
Hay v. McDonald.....	572
Hayward, White v.....	550
Heidt, Van Tassel v.....	234
Henderson, Pleasant Valley Hotel Company v.....	76
Herbert, Pell v.....	730
Herskowitz, Myers v.....	581
Hillyer v. Hynes.....	506
Hines, Matter of Application of.....	45
Holt, Smalley v.....	589
Houghton v. Kern Valley Bank.....	496

Howard, Gideon v.	5
Hynes, Hillyer v.	506
Independent Electrical Supply Company, Francis v.	482
Industrial Accident Commission, Richmond Dredging Co. v.	97
Ingram v. Slayton.	630
In re Brodie.	751
In re Thomas and City of Petaluma.	547
In re Wenman.	592
Jenner, Connell Company v.	350
Jenner Lumber Company, Call v.	310
Jesse A. Linney & Co., West v.	164
Johnson v. Cordes.	619
Johnson v. Johnson.	93
Jones, Shoehair v.	545
Jorgensen, Vulcan Fire Insurance Company v.	763
Karahadian v. Lockett.	411
Kaye v. Superior Court of County of Kern.	269
Keeley v. Erbe.	267
Keeney v. Bank of Italy.	515
Kern Valley Bank, Houghton v.	496
Kitley, People v.	197
Kloster v. Hawn.	100
Kuhn, People v.	319
L. & E. Emanuel, Inc., v. Oberlin Bros. Co.	235
Lake v. Sterling Development Company.	48
Lapique v. Plummer.	317
Levi, Voss v.	671
Lewis, Boss v.	792
Liljefelt v. Blum.	721
Lincoln v. Pacific Electric Railway Company.	83
Linney & Co., West v.	164
Lippert v. Pacific Sugar Corporation.	198
Lobb, Smith v.	790
Lockett, Karahadian v.	411
Locomobile Company of America, Wright v.	694
Lopez, People v.	530
Los Angeles, Consolidated Lumber Company v.	698
Los Angeles, Mono Power Co. v.	675
Los Angeles Ice & Cold Storage Co., Fairmont Creamery Company v.	414
Louis Schultz Company, Carlini v.	669
Lovell, George J. Birkel Company v.	744
Luft v. Arakelian.	463
L. W. Blinn Lumber Company v. Cohn.	386

Mabrier, People v.....	598
Mallard, Hamilton v.....	470
Manor v. Dunfield.....	557
Marino, People v.....	448
Marshall v. Bansome Concrete Company.....	782
Marvin v. Eng-Skell Company.....	42
Maryland Gold Quartz Mining Co., Whildin v.....	270
Maschini, People v.....	424
Matchette v. California Fruit Canners Association.....	156
Matter of Application of Drennan.....	193
Matter of Application of Hines.....	45
Matter of Application of Smith.....	161
May, Grotfend v.....	321
Maybury Ranch Co. v. Devenney.....	586
Mayfield, Alden v.....	684, 724
McAleer, People ex rel. Lyons v.....	135
McDonald, Hay v.....	572
McGinn v. Rees.....	291
Meacham, City Properties Company v.....	696
Medart Manufacturing Co. v. Weary & Alford Company.....	847
Merrill v. Superior Court of City and County of San Francisco..	55
Metcalfe, Suhr v.....	59
Milloglav v. Zacharias.....	561
Mono Power Company v. City of Los Angeles.....	675
Monroe, Fissel v.....	756
Muncey, Pioneer Investment and Trust Co. v.....	740
Myers v. Herskowitz.....	581
National Home and Town Builders, Ellsworth v.....	1
Nolan, People v.....	493
Northern Construction Company, Soule v.....	300
Oakland, City of, Foley v.....	128
Oberlin Bros. Co., L. & E. Emanuel, Inc. v.....	235
O'Dea v. Roberts.....	345
Officer v. Avery Mill and Lumber Company.....	719
Owners Realty Company, Caner v.....	479
Pacific Coast Casualty Company, Rodgers v.....	70
Pacific Electric Railway Company, Lincoln v.....	83
Pacific Kissel Kar Branch, Tockstein v.....	262
Pacific Sugar Corporation, Lippert v.....	198
Palo Alto Mutual Building and Loan Association v. First National Bank of Palo Alto.....	214
Patton, Davies v.....	713
Patty, Pohlmann v.....	390
Pell v. Herbert.....	730
People v. Clayton.....	357

People v. Fealy.....	605
People v. Fodera.....	8
People v. Gibson.....	459
People v. Gilbreth.....	23
People v. Gonzales.....	340
People v. Grandi.....	637
People v. Kitley.....	197
People v. Kuhn.....	319
People v. Lopez.....	530
People v. Mabrier.....	598
People v. Marino.....	448
People v. Maschini.....	424
People v. Nolan.....	493
People v. Schmidt.....	426
People v. Searle.....	228
People v. Slaughter.....	365
People v. Smith.....	195
People v. Stanley.....	624
People v. Stockton.....	467
People v. Wakao.....	454
People v. Wilbur.....	511
People v. Yip Sing.....	236
People ex rel. Bradford v. Barbiere.....	770
People ex rel. Lyons v. McAleer.....	135
Petaluma and Thomas, In re.....	547
Pierce v. Employers' Indemnity Exchange.....	98
Pioneer Investment and Trust Company v. Muncey.....	740
Platnauer v. Superior Court of Sacramento County.....	894
Pleasant Valley Hotel Company v. Henderson.....	76
Plummer, Lapique v.....	817
Pohlmann v. Patty.....	390
Potter v. Back Country Transportation Company.....	24
Preston v. Dunn.....	747
Pridham, Van de Water v.....	252
Prussian National Insurance Co., Wing Chung Long Co. v.....	715
Quigley, Brooke v.....	484
Ramish v. Workman.....	19
Ransome Concrete Company, Marshall v.....	782
Rea, Rudin v.....	665
Rees, McGinn v.....	291
Richmond Dredging Company v. Industrial Accident Commission	97
Richmond Dredging Company, Taucher v.....	803
Rispin, Robinson v.....	536
Robbins, Elliott v.....	577
Roberts, O'Dea v.....	345

Robinson v. Rispin.....	536
Rodgers v. Pacific Coast Casualty Company.....	70
Rodrigues, Graca v.....	296
Roebling Construction Company v. Doe Estate Company.....	397
Rogers, Crouse-Prouty v.....	246
Rolleri v. Rolleri.....	233
Eudin v. Bea.....	665
Sacramento, County of, v. Chambers.....	142
San Joaquin Light & Power Company, Cox v.....	522
Savage Tire Company, Doolittle v.....	476
Savings Bank of Santa Rosa, Williams v.....	655
Schallman v. Haas.....	28
Schmeiser Manufacturing Co., Edgar Bros. Company v.....	667
Schmidt, People v.....	426
Schnierow v. Boutagy.....	336
Schultz Company, Carlini v.....	669
Searle, People v.....	228
Sellars v. Southern Pacific Company.....	701
Shoehair v. Jones.....	545
Shull v. Crawford.....	36
Silman, Brinkley-Douglas Fruit Company v.....	643
Simmons v. Firth.....	187
Slaughter, People v.....	365
Slayton, Ingram v.....	630
Smalley v. Holt.....	589
Smith v. Lobb.....	790
Smith, Matter of Application of.....	161
Smith, People v.....	195
Soule v. Northern Construction Company.....	300
Southern Pacific Company, Sellars v.....	701
Southern Pacific Railroad Company v. Blaisdell.....	239, 243
Squires v. Estey.....	287
Stanley, People v.....	624
Stephens v. Daugherty.....	733
Stephens v. Weyl-Zuckerman & Co.....	566
Sterling Development Company, Lake v.....	48
Stewart v. Stewart Hotel Company.....	167
Stewart Estate Company v. Stewart Hotel Company.....	167
Stewart Hotel Company, Stewart v.....	167
Stockton, People v.....	467
Suhr v. Metcalfe.....	59
Superior Court, Ash v.....	800
Superior Court of County of Kern, Kaye v.....	269
Superior Court of Los Angeles County, Consolidated Lumber Company v.....	126
Superior Court of Sacramento County, Platnauer v.....	394
Superior Court of City and County of San Francisco, Merrill v...	55
Sweeney v. Board of Trustees of Auburn School District.....	331

Taugher v. Richmond Dredging Company.....	303
Thomas, Bunnell v.....	634
Thomas and City of Petaluma, In re.....	547
Tockstein v. Pacific Kissel Kar Branch.....	262
Union Trust Savings Bank of Santa Rosa, Williams v.....	659
Vallade, Braun v.....	279
Van de Water v. Pridham.....	252
Van Tassel v. Heidt.....	234
Vaughan, Compton Land Company v.....	130
Voss v. Levi.....	671
Vulcan Fire Insurance Company v. Jorgensen.....	763
Wakao, People v.....	454
Ward v. Goetz.....	595
Warden v. Choate.....	354
Weary & Alford Company, Fred Medart Manufacturing Co. v.....	347
Wenman, In re.....	592
West v. Jesse A. Linney & Co.....	184
Weyl-Zuckerman & Co., Stephens v.....	566
Whildin v. Maryland Gold Quartz Mining Co.....	270
White v. Hayward.....	550
Whittier, Dilger v.....	15
Wilbur, People v.....	511
Willats v. Bosworth.....	710
Williams v. Savings Bank of Santa Rosa.....	655
Williams v. Union Trust Savings Bank of Santa Rosa.....	659
Wing Chung Long Company v. Prussian National Insurance Co. ..	715
Woody, Conklin v.....	554
Workman, Ramish v.....	19
Worthley v. Worthley.....	473
Wright v. Locomobile Company of America.....	694
Yip Sing, People v.....	236
Young v. Canfield.....	343
Zacharias, Milloglav v.....	561

CASES APPROVED, DISAPPROVED, CRITICISED, AND DISTINGUISHED.

Aikins v. Kingsbury , 170 Cal. 674. Approved.....	49
Akron Cereal Co. v. First National Bank , 3 Cal. App. 198. Distinguised	417
Crow v. San Joaquin etc. Co. , 130 Cal. 309. Disapproved.....	82
Ex parte Frank , 52 Cal. 606. Approved.....	47
Hontz v. San Pedro etc. R. R. Co. , 173 Cal. 750. Approved.....	159
Holland v. Hotchkiss , 162 Cal. 366. Approved.....	289
Judson v. Giant Powder Co. , 107 Cal. 549. Approved.....	208
Love v. Watkins , 40 Cal. 547. Distinguished.....	326
Luco v. De Toro , 91 Cal. 405. Distinguished.....	326
Mabb v. Stewart , 147 Cal. 413. Distinguished.....	81
Mankins v. Forward Movement Syndicate , 28 Cal. App. 285. Distinguised	363
Miles v. Ryan , 172 Cal. 205. Approved.....	334
Pease v. Fitzgerald , 31 Cal. App. 727. Approved.....	267
People v. Diller , 24 Cal. App. 799. Approved.....	15
Teller v. Bay & River Dredging Co. , 151 Cal. 209. Approved.....	82
Turner v. Bauer , 28 Cal. App. 811. Distinguished.....	363

TABLE OF CASES CITED—VOL. 33.

Abbey Land etc. Co. v. San Mateo , 167 Cal. 434.....	270
Adams v. Lambard , 80 Cal. 426.....	345
Agnew v. United States , 165 U. S. 630.....	377
Aikins v. Kingsbury , 170 Cal. 674.....	49
Akron Cereal Co. v. First National Bank , 3 Cal. App. 198.....	417
Alameda County v. Crocker , 125 Cal. 101.....	295
Alaniz v. Casenave , 91 Cal. 41.....	565
Alden v. Mayfield , 163 Cal. 793.....	685, 688
Alden v. Mayfield , 164 Cal. 6.....	584, 724, 726
Alderson v. Houston , 154 Cal. 1.....	540
American Trust etc. Co. v. Boone , 102 Ga. 202.....	518
American Type Founders' Co. v. Packer , 130 Cal. 459.....	653
Anarchists' Case , 122 Ill. 1.....	445, 447, 448
Anderson v. De Urioste , 96 Cal. 404.....	541
Andrews & Johnson Co. v. Atwood , 167 Ill. 249.....	664
Arroyo Ditch etc. Co. v. Superior Court , 92 Cal. 47.....	293, 294
Atchison, T. & S. F. R. Co. v. Shean , 18 Colo. 368.....	704
Aterton v. Defreeze , 129 Mich. 364.....	374
Austin v. Lamar F. Ins. Co. , 108 Mass. 338.....	44
Austin v. Wilcoxson , 149 Cal. 24.....	212
Bailey v. Baker , 28 Cal. App. 537.....	452
Baird v. Monroe , 150 Cal. 560.....	504
Baker, Ex parte , 32 Cal. App. 320.....	453
Baker v. San Francisco Gas etc. Co. , 141 Cal. 710.....	792
Baldwin v. Foss , 71 Iowa, 389.....	570
Baldwin v. Morgan , 50 Cal. 585.....	295
Bancroft v. San Francisco Tool Co. , 120 Cal. 228.....	408
Bank of Hickory v. McPherson , 102 Miss. 852.....	519
Bank of New York N. B. A. v. American Dock & T. Co. , 143 N. Y. 559.....	224
Bank of San Luis Obispo v. Wickersham , 99 Cal. 555.....	182, 183
Bank of Sonoma County v. Gove , 63 Cal. 355.....	723
Barber Asphalt Pav. Co. v. Costa , 171 Cal. 138.....	258
Barnes v. Jones , 51 Cal. 303.....	728
Barnhart v. Conley , 17 Cal. App. 230.....	100
Barnitz v. Beverly , 163 U. S. 118.....	663
Barnum v. Cochran , 143 Cal. 642.....	759
Barr v. Southern California Edison Co. , 24 Cal. App. 22.....	528
Barrell v. Lake View Land Co. , 122 Cal. 129.....	3
Barry v. Bernays , 162 Mo. App. 27.....	344
Bartlett Estate Co. v. Fraser , 11 Cal. App. 373.....	758
Bass v. Williams , 73 Mich. 208.....	665
Bates v. Santa Barbara , 90 Cal. 943.....	335
Baume v. Morse , 13 Cal. App. 456.....	622
Becker v. Boon , 61 N. Y. 317.....	792
Benson v. Shotwell , 87 Cal. 49.....	413
Best v. Wohlford , 144 Cal. 733.....	504, 505
Billings v. Palmer , 2 Cal. App. 432.....	697
Bills v. Silver King Min. Co. , 106 Cal. 9.....	328
Bischoff v. Yorkville Bank , 218 N. Y. 106.....	519
Bischoff v. Yorkville Bank , 170 App. Div. (N. Y.) 679.....	519
Blake's Case , 34 Beav. 639.....	767

Blood v. Marcuse, 38 Cal. 590.....	221
Blythe's Estate, <i>In re</i> , 99 Cal. 472.....	34
Board of Directors of Modesto Irr. Dist. v. Tregea, 88 Cal. 334.....	258
Bohn v. Bohn, 164 Cal. 532.....	683, 756
Bonestell v. Bowie, 128 Cal. 511.....	53
Bonetti v. Treat, 91 Cal. 223.....	339
Boon v. Chamberlain, 82 Tex. 480.....	325
Booth v. Oakland Bank of Savings, 122 Cal. 19.....	660
Borges v. Hillman, 29 Cal. App. 144.....	34
Bostwick v. Mutual Life Ins. Co., 116 Wis. 392.....	125
Bourn v. Hart, 93 Cal. 321.....	147
Boyer v. Barrows, 166 Cal. 757.....	324
Bradbury v. Higginson, 162 Cal. 602.....	674
Bradford v. Woodworth, 108 Cal. 694.....	374
Bradford Inv. Co. v. Joost, 117 Cal. 204.....	192
Bradley Bros. v. Bradley, 20 Cal. App. 1.....	510
Bradley Co. v. Bradley, 165 Cal. 237.....	712
Brewster v. Sime, 42 Cal. 139.....	520
Briles v. Paulson, 170 Cal. 196.....	134
Brison v. Brison, 75 Cal. 525.....	565, 712
Brison v. Brison, 90 Cal. 323.....	508, 565
Brobeck v. Superior Court, 152 Cal. 289.....	613
Brooks v. Forington, 117 Cal. 219.....	295
Brosnan v. Kramer, 135 Cal. 36.....	339
Brown, <i>Ex parte</i> , 95 L. T. 756.....	767
Brum v. Ivins, 154 Cal. 17.....	294
Bryson v. McCone, 121 Cal. 153.....	408, 568
Budd v. Superior Court, 14 Cal. App. 256.....	127
Buick Motor Co. v. Reid Mfg. Co., 150 Mich. 118.....	568
Bundy v. Monticello, 84 Ind. 119.....	519
Burdell v. Grandi, 152 Cal. 376.....	242
Burke v. Maze, 10 Cal. App. 206.....	384
Burling v. Newlands, 112 Cal. 476.....	324
 Cahill v. Stone, 167 Cal. 126.....	287
Calder v. Bull, 3 Dall. (U. S.) 386.....	435, 436
California Steam Nav. Co. v. Wright, 6 Cal. 258.....	298
California Steam Nav. Co. v. Wright, 8 Cal. 585.....	715
California Sugar etc. Agency v. Penoyer, 167 Cal. 274.....	410
California Winemakers' Corp. v. Sciaroni, 139 Cal. 277.....	221
Campbell v. Adams, 50 Cal. 203.....	295
Campbell v. Carty, 162 Cal. 382.....	290
Campbell v. Shafer, 162 Cal. 206.....	505
Carlson v. Shechan, 157 Cal. 692.....	69
Carpenter v. Markham, 172 Cal. 112.....	597
Carter v. Roberts, 140 Cal. 164.....	633
Cassady v. Old Colony Street Ry. Co., 184 Mass. 156.....	208
Castro v. Tewksbury, 69 Cal. 562.....	633
Central National Bank v. Connecticut etc. Ins. Co., 104 U. S. 54..	520
Chandler v. Robinett, 21 Cal. App. 333.....	750
Chan Kin Sing v. Gordan, 171 Cal. 28.....	750
Chapman v. Toy Long, 4 Sawy. 34.....	274
Chase v. Christianson, 41 Cal. 253.....	295
Chipman v. Emeric, 5 Cal. 239.....	728
Cincinnati etc. R. R. Co. v. Bell (Ky.), 74 S. W. 700.....	707
Cincinnati etc. R. R. Co. v. Peters, 80 Ind. 172.....	708
City of Elizabeth v. Hill, 39 N. J. L. 555.....	113
City of Los Angeles v. Winans, 13 Cal. App. 257.....	677
City of Pasadena v. Stimson, 91 Cal. 238.....	423
City Street Improvement Co. v. City of Marysville, 155 Cal. 419..	410

Claflin v. Farmers & Citizens' Bank , 25 N. Y. 293.....	223, 224
Clark v. Beryle , 160 Cal. 306.....	335
Clark v. Kansas City etc. R. R. Co. , 219 Mo. 524.....	110
Clary v. Fitzgerald , 155 App. Div. (N. Y.) 659.....	658
Clemmer v. Drovers' Nat. Bank , 157 Ill. 206.....	518
Clydebang etc. Co. v. Castenada (1905), App. Cas. 6.....	571
Coats v. Coats , 146 Cal. 443.....	100
Cohnfeld v. Tanenbaum , 176 N. Y. 126.....	519
Coker v. Superior Court , 58 Cal. 177.....	697
Coles v. Kennedy , 81 Iowa, 360.....	767
Colton v. Oakland Bank of Savings , 137 Cal. 376.....	792
Columbia College Trustees v. Lynch , 47 How. Pr. (N. Y.) 273.....	163
Commercial Bank v. Pritchard , 126 Cal. 606.....	759
Commonwealth v. Howe , 13 Gray (Mass.), 26.....	779
Commonwealth v. Keyes , 11 Gray (Mass.), 323.....	375
Conlin v. Board of Supervisors , 114 Cal. 404.....	798, 799
Contra Costa Coal Mines R. Co. v. Moss , 23 Cal. 323.....	422
Cook v. Civil Service Commission , 160 Cal. 589.....	139
Cook v. Pendergast , 61 Cal. 72.....	682
Cooney v. Glynn , 157 Cal. 583.....	509
Coplew v. Durand , 153 Cal. 278.....	189, 410
Cordano v. Kelsey , 28 Cal. App. 9.....	290
Couts v. Cornell , 147 Cal. 560.....	290
County of Modoc v. Spencer , 103 Cal. 498.....	556
County of Sacramento v. Pfund , 165 Cal. 84.....	150
County of San Mateo v. Coburn , 130 Cal. 631.....	423
Cox v. McLaughlin , 54 Cal. 605.....	540
Crocker-Wheeler Co. v. Varick Realty Co. , 43 Misc. Rep. (N. Y.) 645	567
Crouse-Prouty v. Rogers , 13 Cal. App. 561.....	247
Crow v. San Joaquin etc. Co. , 130 Cal. 309.....	82
Cummings v. Cummings , 2 Cal. Unrep. 774.....	96
Curtiss v. Bachman , 110 Cal. 433.....	356
Cutting Packing Co. v. Packers' Exchange , 86 Cal. 574.....	541
Danielson v. Neal , 164 Cal. 748.....	327
Davis v. Fish , 1 G. Greene (Iowa), 406.....	570
Davis v. Henderson , 25 Miss. 549.....	519
Davis v. McFarlane , 37 Cal. 634.....	762
Delamatyr v. Milwaukee etc. R. R. Co. , 24 Wis. 578.....	707
Del Monte M. & M. Co. v. Last Chance M. & M. Co. , 171 U. S. 75	276
Denison v. Burrell , 119 Cal. 180.....	662
Deyoe v. Superior Court , 140 Cal. 476.....	756
Diamond Match Co. v. Silberstein , 165 Cal. 282.....	334, 335
Dimond v. Sanderson , 103 Cal. 97.....	508
Dollar v. International Banking Corp. , 13 Cal. App. 331.....	266
Donnelly v. Adams , 115 Cal. 129.....	388
Donnelly v. Adams , 127 Cal. 24.....	388
Donohoe v. Wooster , 163 Cal. 114.....	683
Dorris v. Alturas School Dist. , 25 Cal. App. 30.....	335
Downey v. State , 160 Ind. 578.....	129
Drake v. Duvenick , 45 Cal. 455.....	294
Drinkhouse v. German Sav. & Loan Soc. , 17 Cal. App. 162.....	658, 661
Dubbers v. Goux , 51 Cal. 153.....	529
Dubois v. Spinks , 114 Cal. 289.....	650
Dutton v. Christie , 63 Wash. 373.....	21, 22
Eames v. Crosier , 101 Cal. 260.....	723
Easton v. Montgomery , 90 Cal. 307.....	413

Elizalde v. Elizalde, 137 Cal. 634.....	517
Ellis v. Lennon, 86 Mich. 468.....	107, 108
Emery's Sons v. Irving Nat. Bank, 25 Ohio St. 364.....	647, 648
Eyster v. Parrott, 83 Ill. 517.....	569
Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112.....	261
Falls v. San Francisco etc. R. R. Co., 97 Cal. 114.....	703, 709
Farmers' Nat. Gold Bank v. Stover, 60 Cal. 387.....	543
Fidelity & Deposit Co. v. Industrial Accident Commission, 171 Cal. 728.....	788
First National Bank v. Perris Irr. Dist., 107 Cal. 55.....	335
Firth v. Marovich, 160 Cal. 257.....	242
Fleming v. Hance, 153 Cal. 162.....	798, 799
Forest City Ry. Co. v. Day, 73 Ohio St. 83.....	260
Fowler v. Brooks, 188 Mass. 64.....	472
Frank, Ex parte, 52 Cal. 606.....	47
Fraser v. Oakdale L. & W. Co., 73 Cal. 187.....	294
Frese v. Moore, 1 Cal. App. 587.....	541
Fresno Canal etc. Co. v. Warner, 72 Cal. 379.....	645
Fresno Estate Co. v. Fiske, 172 Cal. 583.....	580
Fritz v. San Francisco, 132 Cal. 373.....	258
Furrey v. Lautz, 162 Cal. 397.....	505
Gardiner v. McDonogh, 147 Cal. 313.....	265
Garey v. Nicholson, 24 Wend. (N. Y.) 350.....	374
George v. Nowlan, 38 Or. 541.....	295
George v. Pierce, 123 Cal. 172.....	561
Gerard v. McCormick, 130 N. Y. 261.....	518
Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585.....	265, 539
Germania Safety-Vault & T. Co. v. Boynton, 71 Fed. 797.....	223
Giles v. Giles, 22 Minn. 348.....	113
Gilmore v. Williams, 162 Mass. 351.....	571
Glass v. Glass, 4 Cal. App. 604.....	41
Glasscock v. Nelson, 26 Tex. 150.....	326
Globe Sav. Bank v. National Bank of Commerce, 64 Neb. 413.....	518
Glock v. Howard & Wilson Colony Co., 123 Cal. 1.....	134
Gnarini v. Swiss American Bank etc., 162 Cal. 181.....	53
Goldstein v. Hort, 30 Cal. 372.....	561
Goldtree v. City of San Diego, 8 Cal. App. 505.....	335, 336
Gonsalves v. Petaluma & S. R. R. Co., 173 Cal. 264.....	530
Goodyear v. Vosburgh, 41 How. Pr. (N. Y.) 421.....	44
Gosliner v. Grangers' Bank of California, 124 Cal. 225.....	466
Governor, Advisory Opinion to, 49 Fla. 269.....	108
Graham v. Mayor, etc., of Fresno, 151 Cal. 465.....	798, 799
Graves v. Mono Lake etc. Min. Co., 81 Cal. 303.....	221
Gray v. Central R. R. Co., 11 Hun (N. Y.), 70.....	302
Gray v. Dougherty, 25 Cal. 266.....	327
Green v. Clifford, 94 Cal. 49.....	53
Gregory v. Gregory, 102 Cal. 50.....	270
Greiner v. Greiner, 58 Cal. 115.....	96
Grey v. Tubbs, 43 Cal. 359.....	492
Gridley v. Fellows, 166 Cal. 765.....	679
Guidery v. Green, 95 Cal. 630.....	544
Gurnee v. Superior Court, 58 Cal. 88.....	114
Hagar v. Board of Supervisors, 47 Cal. 222.....	260
Hall v. E. W. Wells & Son, 24 Cal. App. 238.....	227
Hallett's Case, L. R. 13 Ch. Div. 696.....	517
Hammond v. State, 74 Miss. 214.....	613

Handley v. Stutz, 139 U. S. 417.....	3
Hardy v. Schirmer, 163 Cal. 272.....	27
Harlan v. Stufflebeam, 87 Cal. 508.....	189, 190
Harpold v. Slocum, 168 Cal. 364.....	318
Harris v. San Diego Flume Co., 87 Cal. 526.....	466
Harris v. United States, 4 Okl. Cr. 317.....	436
Harron v. Harron, 128 Cal. 303.....	31
Hartley v. Blease, 99 S. C. 92.....	593
Hartwell v. C. Ganahl Lumber Co., 8 Cal. App. 733.....	388
Haskell v. Haskell, 54 Cal. 262.....	53
Haven v. Haws, 63 Cal. 452.....	578
Haviland v. White, 7 How. Pr. (N. Y.) 154.....	396
Hay v. McDonald, 21 Cal. App. 204.....	574
Hayt v. Bentel, 164 Cal. 680.....	327
Heath v. Silverthorn Lead etc. Co., 39 Wis. 146.....	3
Hellman v. McWilliams, 70 Cal. 449.....	490
Henderson v. Los Angeles Traction Co., 150 Cal. 689.....	26, 27
Henderson v. Palmer Union Oil Co., 29 Cal. App. 451.....	456
Henderson v. State, 98 Ala. 35.....	231
Hentz v. Pennsylvania Co., 134 Pa. St. 343.....	344
Herman v. Santee, 103 Cal. 519.....	295
Herriman v. Menzies, 115 Cal. 16.....	299
Hibernia S. & L. Soc. v. Thornton, 117 Cal. 481.....	327
Hidden v. German Savings & Loan Soc., 48 Wash. 384.....	792
Hight v. United States, Morris (Iowa), 407.....	613
Hilmer v. Hills, 138 Cal. 134.....	646, 647
Hinckley, Estate of, 58 Cal. 457.....	490
Hinrager v. Traut, 69 Iowa, 746.....	328
Hobson v. Hassett, 76 Cal. 203.....	574, 575
Hodge v. Muscatine County, 121 Iowa, 482.....	777, 779
Hodge v. Muscatine County, 196 U. S. 276.....	777, 779
Hoggan v. Cahoon, 31 Utah, 172.....	374
Holland v. Hotchkiss, 162 Cal. 366.....	289
Holmes, Ex parte, 5 Cow. (N. Y.) 426.....	182
Hontz v. San Pedro etc. R. R. Co., 173 Cal. 750.....	159
Hopkins v. Lewis, 18 Cal. App. 107.....	328, 329
Hopt v. Utah, 110 U. S. 574.....	436
Houghton v. Kern Valley Bank, 157 Cal. 289.....	497
Howard v. Thompson Lumber Co., 106 Ky. 566.....	568
Howe v. Schmidt, 151 Cal. 436.....	388
Howlin v. Castro, 136 Cal. 605.....	40
Hubback v. Ross, 96 Cal. 426.....	221
Humboldt Mill. Co. v. Northwestern Pac. R. Co., 166 Cal. 175.....	547
Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 51.....	337
Hyatt v. Allen, 54 Cal. 353.....	472
 Industrial Works v. Mitchell, 114 Mich. 29.....	571
Interstate Nat. Bank v. Claxton, 97 Tex. 569.....	518
Ions v. Harbison, 112 Cal. 260.....	250
Irvin v. Bevil, 80 Tex. 332.....	44
 Jack v. Sinsheimer, 125 Cal. 563.....	736
Jamison v. San Jose etc. R. R. Co., 55 Cal. 593.....	706
Jeffers v. Easton etc. Co., 113 Cal. 345.....	759
Jennings v. Bank of California, 79 Cal. 323.....	4
Johnson v. Canty, 162 Cal. 391.....	290
Johnson v. North Baltimore B. Glass Co., 74 Kan. 762.....	571
Johnston v. Blanchard, 16 Cal. App. 321, 328.....	297, 300
Jones v. Allert, 161 Cal. 234.....	541

Jones v. Jones, 140 Cal. 587.....	249, 508, 510, 565
Jones v. Stockgrowers' Nat. Bank, 17 Colo. App. 79.....	114
Jones & Laughlin Steel Co. v. Abner Doble Co., 162 Cal. 497.....	408
Judge v. Kribs, 71 Iowa, 183.....	777
Judson v. Giant Powder Co., 107 Cal. 549.....	208
Karns v. Olney, 80 Cal. 90.....	250
Kellogg v. Burr, 126 Cal. 38.....	650
Kendall v. Fader, 199 Ill. 294.....	665
Kennedy, In re, 144 Cal. 634.....	440, 613, 614
Kennedy v. Fidelity & Casualty Co., 100 Minn. 1.....	74
King v. Merriman, 38 Minn. 47.....	314
Kingsbury v. Nye, 9 Cal. App. 574.....	112
Kirstein v. Madden, 38 Cal. 158.....	544
Kneiser v. Belasco-Blackwood Co., 22 Cal. App. 205.....	281
Knight v. Black, 19 Cal. App. 518.....	585
Knoxville Water Co. v. East Tennessee Nat. Bank, 123 Tenn. 364.....	223
Kofoed v. Gordon, 122 Cal. 314.....	792
Kohl v. Lilienthal, 81 Cal. 378.....	177, 180
Kowalsky, In re, 73 Cal. 120.....	457
Kring v. Missouri, 107 U. S. 221.....	435, 438
Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., 153 Cal. 725.....	265
Kusel v. Kusel, 147 Cal. 57.....	96
Laguna Drainage District v. Charles Martin Co., 144 Cal. 209.....	261
Lake v. Ocean City, 62 N. J. L. 160.....	259
Lamb v. Lamb, 171 Cal. 577.....	712
Lambert v. Gerner, 142 Cal. 399.....	227
La Mesa Homes Co. v. La Mesa etc. Irr. Dist., 173 Cal. 121.....	258
Lane v. Lane (Q. B.), 65 N. S. Law Journal Rep. (1896), p. 63.....	116
Lathrop v. Bampton, 31 Cal. 17.....	491, 517
Lauricella v. Lauricella, 161 Cal. 61.....	565, 712
Lawrence v. Gayetty, 78 Cal. 126.....	40
Leonard v. Osburn, 169 Cal. 157.....	249
Lesh v. Illinois Steel Co., 163 Wis. 124.....	789
Levy v. Wilson, 69 Cal. 105.....	369
Lisenby v. Newton, 120 Cal. 571.....	541
Littleton v. Fritz, 65 Iowa, 488.....	778
London & S. F. Bank v. Parrott, 125 Cal. 472.....	53
Long v. Newman, 10 Cal. App. 430.....	123
Long Beach School Dist. v. Lutge, 129 Cal. 409.....	335
Los Angeles etc. Assn. v. Pacific Surety Co., 24 Cal. App. 95.....	736
Los Angeles etc. Dev. Co. v. Occidental Oil Co., 144 Cal. 528. 489, 490	
Love v. Watkins, 40 Cal. 547.....	326
Luco v. De Toro, 91 Cal. 405.....	251, 326
Luman v. Golden Ancient Channel M. Co., 140 Cal. 700.....	677
Lund v. Ganahl, 22 Cal. App. 103.....	648
Lunske v. Kerr (Tex. Civ.), 34 S. W. 765.....	44
Mabb v. Stewart, 147 Cal. 413.....	81, 88
Machinery & Electrical Co. v. Young Men's Christian Assn., 22	
Cal. App. 416.....	571
Madera Irr. Dist., In re, 92 Cal. 297.....	258
Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668.....	423
Madsen v. Maryland Casualty Co., 168 Cal. 204.....	123
Magee v. McManus, 70 Cal. 553.....	492
Mandeville v. Solomon, 33 Cal. 38.....	517
Mankins v. Forward Movement Syndicate, 28 Cal. App. 285.....	363
Mannix v. Tryon, 152 Cal. 31.....	408

Mannix v. Wilson , 18 Cal. App. 595.....	571
Marques v. Frisbie , 101 U. S. 473.....	579
Marsh v. Lott , 156 Cal. 643.....	329
Martin v. Zellerbach , 38 Cal. 300, 309.....	177, 178, 181
Mason v. Finch , 2 Scam. (Ill.) 223.....	256
Mason & Craig v. Heyward , 5 Minn. 74.....	118
Mattingly v. Pennie , 105 Cal. 514.....	212
Mayrhofer v. Board of Education , 89 Cal. 110.....	334
McCabe v. Healey , 139 Cal. 30.....	100
McCarthy v. Holland , 30 Cal. App. 495.....	658
McCarty v. Superior Court , 80 Cal. App. 1.....	127
McConnell, Ex parte , 83 Cal. 558.....	439
McCormick v. Stockton etc. R. R. Co. , 130 Cal. 100.....	574
McCormick v. Varnes , 2 Utah, 355.....	275, 276
McCourtney v. Fortune , 42 Cal. 387.....	750
McCrea v. Craig , 23 Cal. 522.....	664
McDonald v. Randall , 139 Cal. 246.....	224
McEwen v. Occidental Life Ins. Co. , 172 Cal. 6.....	653
McGinley v. Hardy , 18 Cal. 116.....	68
McGlynn v. Moore , 25 Cal. 384.....	583
McKannay v. Horton , 151 Cal. 711.....	473
McKenney v. Ellsworth , 165 Cal. 326.....	224
McKinley v. Tuttle , 42 Cal. 570.....	295
McLauchlan v. Bonyngé , 15 Cal. App. 239.....	505
McLellan v. Detroit File Works , 56 Mich. 579.....	226
Medart Pulley Co. v. Dubuque etc. Mill Co. , 121 Iowa, 244.....	570
Meherin v. San Francisco Produce Exchange , 117 Cal. 215.....	481
Memphis & C. R. R. Co. v. Whitfield , 44 Miss. 466.....	706
Merced County v. Helm , 102 Cal. 159.....	163
Merritt v. State , 19 Tex. App. 435.....	163
Metropolitan etc. Assn. In re , 64 L. T. 561.....	767
Miami County Bank v. State (Ind. App.), 112 N. E. 40.....	518
Miles v. Ryan , 172 Cal. 205.....	834, 335
Miller, Ex parte , 162 Cal. 687.....	679, 680
Miller v. Dunn , 72 Cal. 462.....	799
Missouri, K. & T. R. Co. v. Wulf , 226 U. S. 570.....	528
Mitchell v. Clarke , 71 Cal. 163.....	337
Mitchell v. Vermont Copper M. Co. , 67 N. Y. 280.....	792
M. Jacoby & Co. v. Payson , 85 Hun (N. Y.), 367.....	223
Moan, Ex parte , 65 Cal. 216.....	439
Montana Ore Purchasing Co. v. Boston & M. etc. Min. Co. , 20 Mont. 336	277
Montgomery & Mullen Lumber Co. v. Ocean Park Scenic Ry. Co. , 32 Cal. App. 32	750
Moore v. Hanscom , 101 Tex. 293	520
Morrissey v. Gray , 160 Cal. 390	295
Morton v. Broderick , 118 Cal. 474, 480.....	471, 473
Mrous v. State , 31 Tex. Cr. 597	436
Muldoon v. Lynch , 66 Cal. 536	700
Munster's Case , 14 W. R. 957	767
Murdock v. De Vries , 37 Cal. 527	295
Murphy v. Commonwealth (Ky.), 22 S. W. 649.....	231
Murphy v. Crowley , 140 Cal. 141.....	251, 510
Naftzger v. Gregg , 99 Cal. 83.....	34
Nakagawa v. Okamoto , 164 Cal. 718.....	700
Nehawka Bank v. Ingersoll , 2 Neb. (Unof.) 617.....	518
Newport etc. Co. v. Drew , 125 Cal. 585.....	335
New York Life Ins. Co. v. Fletcher , 117 U. S. 519.....	123

Nicholson v. Leatham, 28 Cal. App. 597.....	580
Norris v. Sullivan, 47 Conn. 474.....	110
North Alaska Salmon Co. v. Hobbs, Wall & Co., 159 Cal. 360.....	571
Northern Assurance Co. v. Grand View Bldg. Assn., 183 U. S. 308.....	267
Norton v. Bassett, 154 Cal. 411.....	510
Null v. Elliott, 52 W. Va. 229.....	315
Oberlander v. Fixen Co., 129 Cal. 692.....	287
O'Brien v. Ballou, 116 Cal. 318.....	762
O'Conor v. Clarke, 5 Cal. Unrep. 323.....	723
Odell v. Moss, 130 Cal. 352.....	565
Older v. Superior Court, 157 Cal. 770.....	456, 457
Oriental, The, v. Barclay, 16 Tex. Civ. 193.....	44
Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319.....	783
Pacific Gas & Elec. Co. v. Rollins, 32 Cal. App. 782.....	653
Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 363.....	221, 222
Paddock v. Stout, 121 Ill. 571.....	570
Palmer v. Palmer, 36 Mich. 494.....	328
Pasadena v. Stimson, 91 Cal. 238.....	679
Pascoe v. Baker, 158 Cal. 232.....	682
Patterson v. Adam, 119 Minn. 308.....	72
Pease v. Fitzgerald, 31 Cal. App. 727.....	266, 267
Peniston v. Chicago etc. R. Co., 34 La. Ann. 777.....	706
People v. Akens, 25 Cal. App. 373.....	194
People v. Bartol, 24 Cal. App. 659.....	462
People v. Bawden, 90 Cal. 195.....	439
People v. Beck, 58 Cal. 212.....	617
People v. Bentley, 77 Cal. 7.....	617
People v. Besold, 154 Cal. 363.....	376
People v. Boling, 32 Cal. App. 42.....	24
People v. Brewer, 19 Cal. App. 742.....	460
People v. Brown, 148 Cal. 743.....	443
People v. Burke, 18 Cal. App. 72.....	13
People v. Burns, 27 Cal. App. 237.....	618
People v. Bush, 71 Cal. 602.....	232
People v. California etc. Trust Co., 23 Cal. App. 199.....	521
People v. Campbell, 59 Cal. 243, 247.....	342, 436
People v. Carlson, 8 Cal. App. 730.....	232
People v. Castro, 133 Cal. 11.....	450
People v. Cavallini, 29 Cal. App. 526.....	494
People v. Cipolla, 155 Cal. 224.....	460
People v. Coates, 32 Cal. App. 533.....	425
People v. Cohen, 118 Cal. 74.....	457
People v. Collins, 64 Cal. 293.....	445
People v. Cord, 157 Cal. 568.....	341
People v. Craig, 111 Cal. 460.....	533
People v. Crawford, 24 Cal. App. 396.....	382
People v. Creeks, 170 Cal. 368.....	445
People v. Davis, 147 Cal. 346.....	384
People v. Diller, 24 Cal. App. 799.....	15
People v. Donnelly, 143 Cal. 394.....	444
People v. Drennan, 25 Cal. App. 645.....	194
People v. Durrant, 116 Cal. 179.....	369
People v. Edwards, 163 Cal. 752.....	371
People v. Eldridge, 147 Cal. 782.....	444
People v. Flake, 14 How. Pr. (N. Y.) 527.....	396
People v. Flannelly, 128 Cal. 83.....	443

People v. Fong Ah Sing, 64 Cal. 253.....	460
People v. Fredericks, 106 Cal. 554.....	442
People v. Gallagher, 100 Cal. 466.....	617
People v. Glover, 141 Cal. 233.....	374
People v. Goldenson, 76 Cal. 328.....	600
People v. Haagen, 189 Cal. 115.....	368
People v. Hamilton, 46 Cal. 540.....	382
People v. Hanifan, 98 Mich. 32.....	374
People v. Hatch, 13 Cal. App. 521.....	439, 440
People v. Hayes, 140 N. Y. 484.....	436
People v. Hickman, 113 Cal. 80.....	617
People v. Irwin, 77 Cal. 494.....	616
People v. Kaiser, 119 Cal. 458.....	382
People v. Kauffman, 152 Cal. 331.....	445
People v. Keyser, 53 Cal. 183.....	361, 362
People v. Knapp, 71 Cal. 1.....	232
People v. Koller, 142 Cal. 621.....	376
People v. Lawrence, 143 Cal. 148.....	444
People v. Lee Ah Chuck, 66 Cal. 662.....	460
People v. Leet, 23 Cal. 161.....	504
People v. Lewis, 18 Cal. App. 359.....	382
People v. Lieb, 85 Ill. 484.....	473
People v. Linares, 142 Cal. 17.....	377, 461
People v. Logan, 123 Cal. 414.....	381
People v. Loomis, 170 Cal. 347.....	618
People v. Magri, 32 Cal. App. 536.....	425
People v. March, 6 Cal. 543.....	232
People v. Mathews, 139 Cal. 527.....	377
People v. Maughs, 149 Cal. 253.....	462
People v. Mayes, 113 Cal. 618.....	617
People v. Miller, 122 Cal. 84.....	457
People v. Miller, 125 Cal. 44.....	443
People v. Moore, 155 Cal. 237.....	383
People v. Morley, 8 Cal. App. 372.....	645
People v. Mortimer, 46 Cal. 114.....	438
People v. Mullender, 132 Cal. 217.....	680
People v. Ochoa, 142 Cal. 268.....	443
People v. Oldham, 111 Cal. 648.....	445
People v. Olsen, 80 Cal. 122.....	445
People v. Owens, 123 Cal. 482.....	442
People v. Parks, 58 Cal. 624.....	798, 799
People v. Perry, 25 Cal. App. 337.....	369
People v. Preston, 19 Cal. App. 675.....	382
People v. Price, 26 Cal. App. 544.....	381
People v. Riggins, 159 Cal. 113.....	370
People v. Roach, 17 Cal. 297.....	461
People v. Roberts, 6 Cal. 214.....	232
People v. Rongo, 169 Cal. 71.....	382
People v. Ryan, 152 Cal. 364.....	371, 602
People v. Schafer, 161 Cal. 573.....	369
People v. Schmitz, 7 Cal. App. 330.....	457
People v. Scoggins, 37 Cal. 683.....	342
People v. Scott, 123 Cal. 434.....	442
People v. Sehorn, 116 Cal. 503.....	369
People v. Selby S. & L. Co., 163 Cal. 84.....	287
People v. Shearer, 30 Cal. 645.....	472
People v. Smallman, 55 Cal. 185.....	373
People v. Soto, 11 Cal. App. 431.....	450
People v. Staples, 149 Cal. 405.....	601
People v. State Board of Commissioners, 129 N. Y. 360.....	108

People v. Stephens, 29 Cal. App. 621.....	618
People v. Suesser, 142 Cal. 354.....	869
People v. Tarbox, 115 Cal. 57.....	450
People v. Terrill, 127 Cal. 99.....	457
People v. Turner, 113 Cal. 278.....	320
People v. Walker, 142 Cal. 90.....	361
People v. Wessel, 98 Cal. 352.....	373
People v. Weston, 169 Cal. 393.....	618
People v. White, 20 Cal. App. 156.....	232
People v. Wilmot, 139 Cal. 103.....	534
People v. Winner, 81 Cal. App. 352.....	24
People v. Wong Wang, 92 Cal. 277.....	456
Perry v. Quackenbush, 105 Cal. 299.....	190
Peterson v. Gibbs, 147 Cal. 6.....	315
Phillips etc. Const. Co. v. Seymour, 91 U. S. 646.....	569
Pittsburgh & O. Min. Co. v. Scully, 145 Mich. 229.....	569
Pixley v. Saunders, 168 Cal. 152.....	259
Platnauer v. Superior Court, 32 Cal. App. 463.....	394
Pogue v. Kawaih Power & Water Co., 138 Cal. 664.....	700
Pohlmann v. Patty, 33 Cal. App. 390.....	803
Pond v. Maddox, 38 Cal. 572.....	256
Poorman v. Mills, 39 Cal. 345.....	723
Porritt v. Porritt, 16 Mich. 140.....	114
Porter v. Lassen County etc. Co., 127 Cal. 261.....	67
Potter v. Ahrens, 110 Cal. 674.....	700
Pouchan v. Godeau, 21 Cal. App. 365.....	756
Powell v. Sutro, 80 Cal. 559.....	683
Prey v. Stanley, 110 Cal. 423.....	563
Pritchard v. Whitney Estate Co., 164 Cal. 564.....	526
Quatman v. McCray, 128 Cal. 285.....	242
Queen v. Inhabitants of Christ Church, 12 Victoria, p. 28.....	117
Quigg v. Evans, 121 Cal. 546.....	793, 799
Quinlan v. Providence etc. Ins. Co., 133 N. Y. 356.....	124
Quist v. Sandman, 154 Cal. 748.....	270
Ralphs v. Hensler, 97 Cal. 296.....	67
Ralston v. Bank of California, 112 Cal. 208.....	177, 181, 183
Ramish v. Kirschbraun, 107 Cal. 659.....	646, 647
Ramish v. Workman, 33 Cal. App. 19.....	565
Raymond v. Glover, 122 Cal. 471.....	761
Read v. Buffum, 79 Cal. 77.....	221
Reagan v. United States, 202 Fed. 488.....	629
Reardon v. Balaklala Consol. Copper Co., 103 Fed. 189.....	526, 528, 529
Reclamation District v. Superior Court, 171 Cal. 672.....	796
Reid v. Field, 83 Va. 26.....	570
Reis v. Lawrence, 63 Cal. 129.....	250
Reynolds v. County Court of San Joaquin County, 47 Cal. 604.....	127
Rice v. National City, 132 Cal. 354.....	107
Richardson v. City of Eureka, 96 Cal. 443.....	631
Richter v. Union Land etc. Co., 129 Cal. 367.....	41
Ripperdan v. Weldy, 149 Cal. 667.....	563
Risdon v. Yates, 145 Cal. 210.....	374
Robinson v. Chemical Nat. Bank, 96 N. Y. 404.....	224
Rodgers v. Peckham, 120 Cal. 238.....	466
Rogers v. McCartney, 3 Cal. App. 34.....	248, 249
Rohrer v. Bila, 83 Cal. 51.....	792
Rose v. Stephens etc. Co., 11 Fed. 438.....	207
Roystone Co. v. Darling, 171 Cal. 526.....	336
Ruiz v. Santa Barbara Gas etc. Co., 164 Cal. 188.....	528

Russell v. Chisholm, 23 Cal. App. 727.....	756
Ryan v. United States, 216 Fed. 13.....	445
Sache v. Wallace, 101 Minn. 169.....	295
Sanders v. Dutcher, 168 Cal. 353.....	579
San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216.....	356
San Francisco & S. J. Valley Ry. Co. v. Leviston, 134 Cal. 412.....	423
San Francisco etc. R. R. Co. v. Bee, 48 Cal. 398.....	181
San Francisco Lumber Co. v. O'Neill, 120 Cal. 455.....	388
San Francisco Teaming Co. v. Gray, 11 Cal. App. 314.....	750
San Joaquin L. & W. Co. v. Beecher, 101 Cal. 70.....	3
San Jose Sav. Bank v. Sierra Lumber Co., 63 Cal. 179.....	3
Savage v. Bartlett, 78 Md. 561.....	768
Savings & Loan Soc. v. Burke, 151 Cal. 616.....	290
Savings Bank of Southern California v. Asbury, 117 Cal. 96.....	192
Sayre v. Weil, 94 Ala. 466.....	520
Schindler v. Green, 149 Cal. 752.....	189
Schott v. Schott, 168 Cal. 342.....	40
Schulte v. Boulevard Gardens Land Co., 164 Cal. 464.....	
.....	177, 182, 183, 184
Scrapp v. Sallee, 24 Cal. App. 133.....	369
Sharman v. Continental Ins. Co., 167 Cal. 117.....	124
Sharon v. Sharon, 67 Cal. 185.....	30
Shepley v. Cowan, 91 U. S. 330.....	579
Shoemaker v. Acker, 116 Cal. 239.....	539
Siefert v. Dillon, 83 Neb. 322.....	778
Silisbee State Bank v. French Market G. Co., 103 Tex. 629.....	520
Silva v. Campbell, 84 Cal. 420.....	583
Simon Newman Co. v. Lassing, 141 Cal. 174.....	677
Sinkler v. Siljan, 136 Cal. 356.....	723
Sirch Electrical & T. Laboratories v. Garbutt, 13 Cal. App. 435.....	570
Sivers v. Sivers, 97 Cal. 518.....	192
Skookum Oil Co. v. Thomas, 162 Cal. 539.....	328
Smith v. Dubost, 148 Cal. 622.....	553
Smith v. Los Angeles Immigration etc. Assn., 78 Cal. 289.....	225
Smith v. State, 61 Miss. 759.....	613
Smith v. Union Oil Co., 166 Cal. 217.....	107
Soberanes v. Soberanes, 97 Cal. 140.....	475
Southern California Lumber Co. v. Jones, 133 Cal. 242.....	663
Southern Pac. Co. v. Von Schmidt Dredge Co., 118 Cal. 368.....	574, 575
Southern Pac. R. R. Co. v. Blaisdell, 33 Cal. App. 239.....	244
Southern Pac. R. R. Co. v. Superior Court, 59 Cal. 471.....	293
Southwestern Surety Ins. Co. v. Pillsbury, 172 Cal. 768.....	784
Spear v. United Railroads, 16 Cal. App. 637.....	28
Spies v. People (The Anarchists' Case), 122 Ill. 1.....	445, 447, 448
Spinney v. Griffith, 98 Cal. 149.....	663
State v. Bartlett, 50 Or. 440.....	462
State v. Boyd, 2 Hill (S. C.), 288.....	613
State v. Boyd, 21 Wis. 210.....	114
State v. Cronan, 23 Nev. 437.....	3
State v. District Court, 48 Mont. 425.....	593
State v. Fanning, 96 Neb. 123.....	778, 779
State v. Gilbert, 126 Minn. 95.....	777, 779
State v. Harrington, 31 Mont. 298.....	293
State v. Jennings, 27 Ark. 419.....	256
State v. Jerome, 80 Wash. 261.....	777
State v. Wells, 111 Mo. 533.....	462
State v. Whitaker, 45 La. Ann. 1299.....	395, 396
Steele v. Steele, 25 Pa. St. 154.....	328
Stevens v. Irwin, 15 Cal. 503.....	561

Stevens v. McCrystal, 150 Fed. 85.....	325
Stevenson v. Colgan, 91 Cal. 649.....	146, 147
Stevinson v. Joy, 164 Cal. 279.....	561
Stewart v. Sefton, 108 Cal. 197.....	728
Stiewel v. Lally, 89 Ark. 195.....	570
Story v. Story & I. Commercial Co., 100 Cal. 31.....	34
Strebin v. Lavengood, 163 Ind. 478.....	874
Stringer v. Davis, 30 Cal. 318.....	544
Suisun Lumber Co. v. Fairfield School Dist., 19 Cal. App. 587.....	335
Swanson v. Kirby, 98 Ga. 586.....	298
Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242.....	539
Tapscott v. Mexican Colo. etc. Co., 153 Cal. 667.....	177
Tarbet v. Flagstaff Min. Co., 98 U. S. 463.....	275, 276
Taxicab Motor Co. v. Pacific Coast Casualty Co., 78 Wash. 631.....	74
Teale v. Southern Pac. Co., 20 Cal. App. 570.....	705, 707
Teller v. Bay & River Dredging Co., 151 Cal. 209.....	82
Tenement House Dept. v. McDevitt, 215 N. Y. 150.....	779
Third Nat. Bank v. Lange, 51 Md. 138.....	518
Thomas v. Pacific Beach Co., 115 Cal. 136.....	328
Thompson's Appeal, 22 Pa. St. 16.....	491
Thompson v. American Fruit Co., 21 Cal. App. 338.....	756
Thompson v. Toland, 48 Cal. 99.....	520, 521
Tibbets v. Fore, 70 Cal. 245.....	96
Tidwell v. Southern Engine etc. Works, 87 Ark. 52.....	570
Tirrell v. Jones, 39 Cal. 655.....	345
Torrance v. McDougald, 12 Ga. 526.....	256
Town of Susanville v. Long, 144 Cal. 362.....	472
Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.), 393.....	179
Treweek v. Howard, 105 Cal. 434.....	53
Turner v. Bauer, 28 Cal. App. 311.....	363
Turner v. Wilson, 171 Cal. 600.....	255
Tuttle v. Bunting, 147 Iowa, 153.....	777
Union Stock-yards Nat. Bank v. Gillespie, 137 U. S. 411.....	520
United States v. Emerson, 6 McLean, 406.....	382
United States v. Reed, 2 Blatchf. 437.....	613
United States v. Sioux City Stock-yards Co., 162 Fed. 556.....	727
United States v. Throckmorton, 98 U. S. 61.....	580
United States Fidelity & G. Co. v. Adoue, etc., 104 Tex. 379.....	519
United States Fidelity & G. Co. v. First Nat. Bank, 18 Cal. App. 437.....	518
United States Fidelity & G. Co. v. Union Bank & T. Co., 228 Fed. 448.....	519
Utley v. S. N. Wilcox Lumber Co., 59 Mich. 263.....	314
Valensin v. Valensin, 28 Fed. 602.....	96
Vance v. Smith, 124 Cal. 219.....	651
Vanderberg, In re, 28 Kan. 173.....	256
Van Maren v. Johnson, 15 Cal. 312.....	96
Vercoutere v. Golden State L. Co., 116 Cal. 410.....	183
Wadleigh v. Phelps, 147 Cal. 541.....	683
Wagner v. People, 30 Mich. 384.....	374
Walker v. Superior Court, 135 Cal. 369.....	361
Wallace v. Byers, 14 Tex. Civ. App. 574.....	44
Walls v. Preston, 25 Cal. 60.....	759
Walrath v. Champion Min. Co., 63 Fed. 552.....	276
Ward, In re, 20 N. Y. Supp. 606.....	804

Ward v. City Trust Co., 192 N. Y. 61.....	222, 223
Waterman v. Bates, 144 U. S. 394.....	328
Weil v. State, 52 Ala. 19.....	163
Welcome v. Hess, 90 Cal. 507.....	674
Welsh v. Cross, 146 Cal. 621.....	663
West Coast Lumber Co. v. Knapp, 122 Cal. 79.....	388
Western States Life Ins. Co. v. Lockwood, 166 Cal. 185.....	222
White v. Bank of Hanford, 148 Cal. 552.....	134
Wickson v. Monarch Cycle Mfg. Co., 128 Cal. 156.....	669
Williams v. Bergin, 116 Cal. 56.....	481
Williams v. Savings Bank of Santa Rosa, 33 Cal. App. 655.....	659
Winship v. New York etc. B. Co., 170 Mass. 464.....	208
Wolfley v. Lebanon Mining Co., 4 Colo. 112.....	273
Wolters v. King, 119 Cal. 172.....	193
Wood v. Fleetwood, 19 Mo. 529.....	44
Woodside v. Hewel, 109 Cal. 481.....	489, 490
Wyman v. Hooker, 3 Cal. App. 36.....	188, 189
Young v. Bransford, 12 Lea (Tenn.), 232.....	208
Young v. New Standard etc. Co., 148 Cal. 306.....	4
Yuba County v. North American etc. Min. Co., 12 Cal. App. 223	678, 680

CITATIONS—VOL. 33.

CALIFORNIA.

CONSTITUTION.

Art. I	109
Art. I, sec. 9	455
Art. I, sec. 13	15, 47
Art. I, sec. 21	47
Art. IV, sec. 19	106, 114
Art. IV, sec. 22	145, 146, 150, 155
Art. IV, sec. 31	145, 146, 150
Art. V, sec. 19	112
Art. VI, sec. 4	99
Art. VI, sec. 4½	41, 189, 363, 383, 618
Art. VI, sec. 5	114
Art. XI, sec. 4	148
Art. XI, sec. 6	258
Art. XI, sec. 7½	136
Art. XI, sec. 12	259, 795, 796, 798, 799
Art. XI, sec. 13	145, 147, 259, 794, 795
Art. XIII, sec. 14	795, 797, 798
Art. XX, sec. 14	793
Art. XX, sec. 15	663

STATUTES.

1881, p. 23. Action Against City or County	677
1903, p. 354. Swamp-lands	253
1907, p. 700. Action Against City or County	678
1909, pp. 86-90. Banking	657, 658
1909, p. 404. Fire Insurance Policy	716
1909, p. 663. Hunting License	150
1909, pp. 1083-1086. Appeals	361
1911, p. 796. Employers' Liability	6, 92, 166
1911, p. 1003. Banking	657, 658, 660
1911, p. 1313. Meehanic's Lien	663
1911, p. 1315. Mechanic's Lien	334, 335, 336
1911, p. 1422. Mechanic's Lien	332
1911, p. 1551. Oakland Charter	128
1911, p. 1575. Oakland Charter	129
1911, p. 1577. Oakland Charter	129
1911, p. 1605. Oakland Charter	129
1913, pp. 20-22. Redlight Abatement Law	771
1913, p. 560. Tax Title	290
1915, p. 359. Swamp-lands	253
1915, p. 575. Registration	793

STATUTES—Continued.

1915, p. 721. Action Against City or County.....	678
1915, p. 1502. Los Angeles Food Control District.....	261
1915, p. 1530. Tuberculosis Bureau.....	143, 144
Deering's Gen. Laws 1915, p. 1123. City Charters.....	162

CODE OF CIVIL PROCEDURE.

SECTION	PAGE	SECTION	PAGE
226	369	956	756
227	369	963	756
318	250, 251, 510	978	127
337	322, 327, 480, 481, 750	978a	126, 127
338	250, 507, 509	1000	540
339	76, 507, 750	1025	337
340	523	1027	394
343	250, 322, 480, 507, 510	1032	394
368	63	1049	84
377	524, 525, 526, 528, 530	1104	270
392	682	1159	631
393	682	1161	583, 585
394	676, 677, 678, 679, 680, 681, 682, 683	1172	638
395	679, 681, 682	1174	736
396	677, 681, 682, 683	1176	21
397	681	1183	335, 663
410	293	1184	66, 333, 335, 663
473	238, 293, 526, 529	1187	189
475	189	1218	779
529	356	1238	420, 421, 422
565	456	1241	421, 423
585	721	1243	681
689	644, 649, 650, 651	1244	421, 422
715	742	1504	651
717	742	1854	641
720	742, 743	1856	746
733	728	1870	460, 616
948	127	1925	578
951	744	1933	475
953	94, 744	1986	56, 57, 58
953a	94, 318, 346	1991	57, 58
953b	94, 318	2024	44
953c	318	2051	616

CIVIL CODE.

SECTION	PAGE	SECTION	PAGE
136	97	138.....	31, 35, 36
137	94	139	31, 35, 36

CIVIL CODE—Continued.

SECTION	PAGE	SECTION	PAGE
140	31, 35, 36	1639	65
172	96	1647	65
196a	31, 32, 33, 35, 36, 626	1649	496
809	173, 182, 183	1654	65
322	540	1670	699, 735, 736
343	177	1671	699, 700, 735, 736
359	181	1673	297
465	420, 421, 422	1674	297, 298, 299, 300
852	490	1689	40
853	563	1698	544
857	490	1914	345
993	298	1970	524, 525, 526, 528, 530
1018	686, 692	2026	416
1019	686, 692	2230	221
1109	242	2234	221
1114	330	2300	466
1489	792	2306	221
1492	571	2310	227
1600	792	2322	221
1501	792	2325	349
1504	792	2369	416
1511	67, 68	2986	559
1530	544	2991	416, 417, 418
1531	543, 544	3123	226
1532	544	3124	226
1589	541	3300	337
1624	669	3345	725
1625	265, 746	3440	560, 758, 759, 760, 761
1638	65	3442	761

PENAL CODE.

SECTION	PAGE	SECTION	PAGE
20	14	801	625
192	231	919	613
207	593	921	613
208	593	950	439, 512
245	641	951	512
261	451	952	512
270	626	959	456
288	195	995	434, 439
315	775	1004	512
316	775	1033	599
367c	9	1076	441, 442
476a	513	1108	461, 463
548	606	1111	461, 463

PENAL CODE—Continued.

SECTION	PAGE	SECTION	PAGE
1138	380	1185	512
1170	360, 361, 362	1191	23, 24
1171	360, 361	1202	23
1172	360	1239	361
1173	360	1240	360
1174	360	1246	362
1175	360	1247	358, 359, 361
1177	360	1247a	361
1181	358, 361	1247c	358

POLITICAL CODE.

SECTION	PAGE	SECTION	PAGE
633	121	4041	145, 148, 556
1096	392, 801	4075	397
1097	392	4078	397
1106	392, 393, 803	4091	794
1109	393, 801, 803	4171	453
1111	801, 802	4223	145, 148
2978-2984	793	4230	136, 440
2984	793	4307	145, 149, 557
3898	290	4484	255
4024	440		

ENGLISH.

Act 1895, sec. 4. Married Women.....	116
--------------------------------------	-----

MAINE.

Const., art. IV, pt. 111, sec. 10. Constitutional Law.....	108
--	-----

MICHIGAN.

Comp. Laws 1857, sec. 3227. Statutory Construction.....	114
---	-----

MISSOURI.

Rev. Stats. 1899, sec. 4160. Statutory Construction.....	111
--	-----

UNITED STATES.

Act July 26, 1866 and 1872. Mining.....	273, 274, 275, 276, 278
Rev. Stats., sec. 954. Amendment of Pleading.....	526, 527
Rev. Stats., sec. 2326. Land Patent.....	322

WISCONSIN.

Code, sec. 4972. Statutory Construction.....	110
--	-----

REPORTS OF CASES
DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA.

[Civ. No. 2204. Second Appellate District.—February 13, 1917.]

LUCIE E. ELLSWORTH, Respondent, v. NATIONAL HOME AND TOWN BUILDERS, Appellant.

CORPORATION—ISSUANCE OF STOCK—SERVICES PERFORMED—CONSIDERATION.—Corporate stock issued in consideration of valuable services rendered and labor performed for the corporation is not issued without consideration.

Id.—MEETING OF STOCKHOLDERS CONTRARY TO BY-LAWS—ASSENT OF STOCKHOLDERS—LEGALITY OF ACTS.—In an action to recover damages for conversion, based upon the refusal of a corporation to transfer to the plaintiff certain shares of its capital stock, which the plaintiff had acquired from a third party to whom the stock had been theretofore issued for services rendered and labor performed for the corporation, the defendant cannot contend that the issuance of the stock was unauthorized, on the ground that the stockholders' meeting at which the board of directors was elected who voted the issuance of the stock was held outside of the state under whose laws the corporation was created and in violation of the by-laws, where all the stockholders gave their consent to such meeting and participated in such election.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

Gray, Barker & Bowen, and Flint, Gray, Barker & Bowen, for Appellant.

S. L. Carpenter, for Respondent.

SHAW, J.—This action to recover damages for conversion is based upon defendant's refusal to transfer to plaintiff certain shares of its capital stock, evidenced by a duly indorsed certificate, No. 167, which the latter had acquired from one J. F. Clark, to whom the defendant corporation had theretofore issued the stock. Judgment went for plaintiff, from which, and an order denying its motion for a new trial, defendant appeals.

As grounds for reversal, appellant claims: (1) That the stock was issued without consideration; (2) that the issuance thereof was unauthorized by the corporation; (3) that at the time when plaintiff demanded the making of the transfer, another party, with defendant's knowledge, held an option from plaintiff's assignor for the purchase of the stock, which fact was also known to plaintiff; (4) that a transfer of the stock would be in violation of a pooling agreement to which appellant was a party, the existence of which was known to plaintiff, and (5) that plaintiff paid no consideration for the stock.

First. There is no merit in the first contention, since the uncontradicted record shows that the stock was issued by the corporation to Clark in consideration of valuable services rendered and labor performed by him for and on behalf of the corporation.

Second. The contention that the issuance of the stock to Clark was illegal is based chiefly upon the fact that defendant was a corporation created under the laws of the state of Arizona; that the by-laws of the company provided that all meetings of stockholders, whether regular or special, should, upon notice as therein prescribed, be held in Phoenix, Arizona, whereas the board of directors which authorized the issuance of the stock to Clark was elected at a special meeting of the stockholders held, without notice given as provided in the by-laws, in the city of Los Angeles, California; all of which facts appear to be true. But it is likewise true that the holders of all of the outstanding stock in writing consented to the holding of such meeting in the city of Los Angeles, and waived notice thereof, and that at the meeting so convened pursuant to such written consent, all of the stock of said corporation then issued was represented at said meeting and participated in the election of members of the board, each and all of whom received the unanimous vote of all the stock

so represented. The board of directors so elected organized by electing officers, and in transacting the business of the corporation, assumed to and did act as the duly constituted board of directors of the company. Appellant insists that, by reason of the stockholders' meeting being held outside of Arizona, contrary to the by-laws of the company, such meeting and all proceedings there had were without right or authority, and hence wholly void. We cannot assent to this contention. It may be conceded that in a proper proceeding the members of the board so elected might have been ousted from office (*State v. Cronan*, 23 Nev. 437, [49 Pac. 41]), but they were, nevertheless, so long as they continued to act as the duly constituted board, *de facto* officers (*San Joaquin L. & W. Co. v. Beecher*, 101 Cal. 70, [35 Pac. 349]; *Barrell v. Lake View Land Co.*, 122 Cal. 129, [54 Pac. 594]), the validity of whose acts is not subject to attack in an action of the character of that here involved. (*San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179; 2 Cook on Corporations, 6th ed., sec. 623.) Meetings held in violation of charter provisions have been held void. Mr. Cook in his work on Corporations, sixth edition, section 589, in discussing such authorities, says: "It is the sounder view to regard the votes and proceedings at such a meeting as voidable rather than void. The corporation itself cannot allege that such proceedings are void. It is estopped from so doing. So, also, are the stockholders who participated in the meeting." (To the same effect, see *Handley v. Stutz*, 139 U. S. 417, [35 L. Ed. 227, 11 Sup. Ct. Rep. 530]; *Heath v. Silverthorn Lead etc. Co.*, 39 Wis. 146; Thompson on Corporations, sec. 814.) The stockholders' meeting in question, so far as disclosed by the record, was not in violation of any provision of the charter, but contrary to the by-laws which had been adopted by the stockholders. Neither the corporation nor the stockholders, all of whom, as stated, were present and united in the election of this board of directors by unanimous vote of all the outstanding stock, as against plaintiff, who acquired the certificate in usual course, are in any position to assert as void the act of the board in issuing the stock to her vendor.

Third. Appellant offered in evidence a document signed by J. F. Clark, E. E. Ragsdale, and one Joseph P. Smith, whereby Clark and Ragsdale agreed that Smith should have an option for a period of twelve months from August 5, 1911,

to purchase from said Clark and Ragsdale two hundred thousand shares of the capital stock of appellant corporation for the sum of two thousand dollars, to the introduction of which plaintiff's objection was sustained. No error is predicated upon this ruling. Waiving such omission, we perceive no error in the ruling for the reasons, first, that the agreement appears to have been made without any consideration therefor; and, second, there is nothing in the agreement showing that it had reference to the stock evidenced by certificate No. 167, issued to Clark long after the making of said agreement. We cannot assume that the fifty thousand shares of stock so purchased by plaintiff was in violation of this agreement made by Ragsdale and Clark, or if Smith exercised the option they would not deliver to him the stock as agreed. There was no error in the ruling of the court in excluding from evidence this document.

Fourth. It is next claimed that the stock in question so owned by Clark was subject to a pooling agreement signed by Clark. It is true a document was offered in evidence to which the signature of Clark was attached, providing that the stock and the certificates evidencing the same, owned by the signers thereof, should be deposited with —, as trustee. Such pooling agreement, however, was never consummated, and the evidence clearly shows that certificate No. 167 was at all times up to the time when he delivered same to the plaintiff herein in the control and custody of Clark. There is no evidence of any circumstance that justified or excused the corporation for refusing to transfer the stock on demand of the plaintiff, and hence the cases of *Jennings v. Bank of California*, 79 Cal. 323, [12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852], and *Young v. New Standard etc. Co.*, 148 Cal. 306, [83 Pac. 28], have no application to the facts here presented.

Fifth. It must follow from what has been here said that whether or not plaintiff paid any consideration for the stock was no concern of appellant, and hence it was not error for the court to exclude any evidence as to the consideration paid therefor.

The judgment and order are affirmed.

Conrey, P. J., and James J., concurred.

[Civ. No. 2197. Second Appellate District.—February 18, 1917.]

O. P. GIDEON, Appellant, v. P. A. HOWARD et al., a Copartnership, etc., Respondents.

NEGLIGENCE—BREAKING OF DEFECTIVE ROPE—INJURY TO EMPLOYEE OF BRIDGE COMPANY—ERRONEOUS NONSUIT.—In an action to recover damages for injuries sustained by an employee of a bridge construction company from the breaking of a rope while pulling away a board mold from around hardened concrete, it is error to grant a motion for nonsuit at the close of the case, where the evidence tends to show that the rope was known to the defendants to be worn and weakened to an extent that rendered it unfit for the purpose.

APPEAL from an order of the Superior Court of Los Angeles County denying a motion for a new trial. J. P. Wood, Judge.

The facts are stated in the opinion of the court.

Miller & Miller, and E. B. Drake, for Appellant.

Flint, Gray & Barker, and Gray, Barker & Bowen, for Respondents.

SHAW, J.—In this action plaintiff sought to recover damages for personal injuries alleged to have resulted from the negligence of defendants as copartners. At the close of the evidence, defendants offering none, the court, at their request, instructed the jury to render a verdict for defendants, which being done, judgment followed in accordance therewith.

The appeal is from an order of court denying plaintiff's motion for a new trial.

The question presented is one of law as to whether or not there was any substantial evidence as to facts determinative of the case upon which the jury could have properly found for plaintiff.

The evidence tends to establish the following facts: Plaintiff was an employee of defendants, who were contractors engaged in the erection of a bridge, in the construction of which wooden molds or forms were made into which concrete was deposited, and after it set and hardened these molds or forms

were detached therefrom. As such employee, plaintiff, with others, not only worked as a carpenter in making and installing these forms, but in detaching them from the hardened concrete walls by various means, among which was that of attaching thereto ropes provided by defendants and pulling them loose by hand. At the time in question, when plaintiff sustained the injuries of which he complains, two men had thus, for the purpose of removing one of the molds, attached a rope thereto, and, being unsuccessful in breaking it away, called upon plaintiff and another, who were at work on the bridge, to aid them in pulling it away. They responded, and their united strength applied in pulling upon the rope caused it to break, as a result of which plaintiff, with the others, all of whom were at the time on the ground, was precipitated backward into a depression some eighteen inches deep to a point ten or twelve feet distant, where he fell upon a stump, the others falling upon him, and, in some way undisclosed by the record, was injured. The rope was a five-eighths or three-fourths inch in size and about forty-five feet in length. Some three or four days prior to the accident, plaintiff, while using this rope on a scaffold some forty feet from the ground, discovered that it was badly worn, weakened, and cut, for which reason he removed it from the swing he was working on, came down, and informed Mr. Crump, the superintendent in charge of construction, of its condition, telling him that the rope was "not fit to work on," and threw it upon the ground under an abutment of the bridge, from which place his coemployee, when requiring a rope for use in detaching the mold, secured and used it for the purposes aforesaid, which fact, however, was unknown to plaintiff until after the accident.

At the time in question a statute then in force (Stats. 1911, p. 796), provided that in actions by employees to recover for personal injuries based upon want of reasonable care of the employer, contributory negligence of the employee should not bar a recovery where such negligence was slight and that of the employer, by comparison, gross; nor, as provided by the same statute, did the fact that the employee assumed the risk, or that the jury was due to the negligence of a coemployee, constitute a bar to his recovery. Since, therefore, negligence on the part of the plaintiff or that of a fellow-servant is not involved, the sole question presented by the record is whether or not there was any substantial evidence introduced from

which the jury might have found that defendants were guilty of negligence in furnishing a defective rope for plaintiff's use in pulling away the concrete mold. Not only did the evidence tend to show that the rope was supplied by defendants, but such fact is admitted by the answer, which denied only that they *negligently* furnished the same. The proximate cause of the injury was the breaking of the rope used by plaintiff, which use was within the scope of his employment. It was the duty of defendants to exercise reasonable care to provide their employees with safe appliances in the performance of the work required of them, and under the facts here presented the rope was an appliance which the evidence tends to show was, with defendants' knowledge, worn and weakened to an extent that rendered it unsafe for the purpose.

There is no merit in respondents' contention that the stump upon which plaintiff fell, and not the breaking of the rope, was the proximate cause of the injury. It is reasonably certain that but for the breaking of the rope plaintiff would not have fallen backward upon the stump and his coemployees would not have fallen upon him. But it may be that falling upon the stump contributed nothing toward his injuries; the record is silent upon that point. It might with equal logic be claimed that where a defective cable used in hoisting one to the top of a building breaks, precipitating him upon a pile of stone underneath, the pile of stone, and not the breaking of the cable, was the proximate cause of his injury.

It is further claimed that the circumstances were such that the defendants could not reasonably have anticipated an injury resulting from the breaking of the rope. This and the question as to whether or not the injury sustained by plaintiff was due to causes which men in defendants' position could, in the exercise of ordinary prudence, reasonably have foreseen and guarded against, are matters which, in our opinion, should, upon the record presented, have been submitted to the jury.

The order denying plaintiff's motion for a new trial is reversed.

Conrey, P. J., and James J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 12, 1917.

[Crim. No. 668. First Appellate District.—February 14, 1917.]

THE PEOPLE, Respondent, *v.* ANTONE FODERA,
Appellant.

CRIMINAL LAW—FAILURE TO STOP AND RENDER ASSISTANCE UPON AUTOMOBILE COLLISION—EVIDENCE—REPUTATION FOR KINDNESS AND GENTLENESS.—Upon a charge of violating section 367c of the Penal Code, requiring drivers of automobiles colliding with other vehicles to stop and render assistance to the occupants of the vehicle collided with and who may have been injured by such collision, it is within the proper bounds of cross-examination to ask witnesses produced by the defendant who had testified as to his good reputation for kindness and gentleness whether they had ever heard that the defendant had been arrested for picking chickens alive, or that he had been arrested for running down a boy or man, or that he had been arrested for unlawfully killing an elk.

ID.—PREVIOUS ARRESTS AND FINES FOR UNLAWFUL SPEEDING.—No prejudicial error can be predicated upon the action of the district attorney in making, or of the court in permitting, inquiry as to whether the character witnesses for the defendant knew of his arrests and pleas of guilty and fines for unlawful speeding, where no assignment of misconduct was made to the questions, and there was no request for admonition or instruction to the jury to disregard the evidence.

ID.—SELLING OF STOLEN AUTOMOBILES—MISCONDUCT OF DISTRICT ATTORNEY—LACK OF PREJUDICE.—No prejudicial error can be predicated upon the misconduct of the district attorney in asking the character witnesses called by the defendant as to whether they had heard it discussed that the defendant was under investigation by the police department for the selling of several stolen automobiles, where objections were sustained to the questions, no request made to the court to admonish or instruct the jury to disregard the misconduct, and the court of its own motion instructed the jury to disregard questions which contained insinuations against any party to the action.

ID.—VISITING MEMBERS OF BLACK HAND SOCIETY.—Prejudicial error cannot be predicated upon the misconduct of the district attorney in asking a witness whether he ever heard discussed that on the day of the crime the defendant was visiting at the home of a person who had been arrested as a member of the Black Hand Society, where the defendant allowed the question and answer to stand and made no request for the jury to be instructed to disregard the same.

ID.—KNOWLEDGE OF COLLISION—ELEMENT IMPLIED—CONSTITUTIONALITY OF SECTION 367c, PENAL CODE.—Section 367c of the Penal Code is

not unconstitutional because it does not expressly embody in its phraseology words limiting its application to those persons who knowingly cause their vehicles to collide with those occupied by others, as the element of knowledge of the fact of the collision is necessarily to be implied from the requirements of the act to the effect that drivers of such vehicles must stop and render aid to those who may possibly have been injured in the collision.

ID.—DISCLOSURE OF NUMBER OF COLLIDING VEHICLE—NAME AND ADDRESS OF DRIVER.—Such section is not unconstitutional in requiring the driver of a colliding vehicle to give the number of his machine and his name and address, as such requirement does not compel him to be a witness against himself in violation of section 13 of article I of the constitution.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial.
W. A. Beasley, Judge.

The facts are stated in the opinion of the court.

W. E. Foley, and Devoto, Richardson & Devoto, for Appellant.

U. S. Webb, Attorney-General, John H. Riordan, Deputy Attorney-General, Arthur M. Free, District Attorney, and Archer Bowden, Deputy District Attorney, for Respondent.

LENNON, P. J.—This is an appeal from a judgment of conviction of the defendant upon the charge of a violation of section 367c of the Penal Code, requiring drivers of automobiles colliding with other vehicles to stop and render assistance to the occupants of the vehicle collided with and who may have been injured by such collision, under penalties which render the act or neglect of such drivers in failing or refusing to comply with such requirements a felony.

The facts of this case immediately preceding, attending, and succeeding the collision are substantially these: On the evening of October 31, 1915, a little after sunset, the defendant was proceeding northward along the state highway near the town of Mayfield, in the county of Santa Clara, on his way home to San Francisco from Coyote, in that county, to which place he had made the trip earlier in the day. There were four companions with the defendant in the car, which

he was driving at a rate estimated as exceeding forty miles an hour. A closed limousine, in which two ladies—Mrs. Carolan and Miss Shute—were being driven by a chauffeur, was also proceeding northward along the highway at that point at about twenty-five miles an hour. The defendant undertook to pass the limousine, swerving to the left in order to do so. At the moment of passing a tandem motorcycle, driven by one Hector Zapata with one Joseph Ottens as his companion, two young students of the university of Santa Clara, were going southward at the rate of eighteen to twenty miles an hour, and were also about to pass said limousine, when a collision occurred between the defendant's machine and said motorcycle, in which Zapata was instantly killed and Ottens severely injured. The defendant did not stop or check his speed, but rather increased it until he was overtaken at Mayfield by the Carolan car, when the chauffeur called to the defendant to stop. There is also some evidence that the chauffeur, who spoke English imperfectly, made some remark to the defendant to the effect that he had killed somebody. The defendant stopped momentarily, but did not return to the scene of the collision, but continued rapidly on his way to San Francisco, until he was finally halted by the officers at Burlingame. He insisted at all times that he did not know of the collision at the time of its occurrence, and in this he was supported by the testimony of the four other persons who were occupants of the car. The evidence educed at the trial disclosed, however, that the impact of the collision was distinctly heard by the two ladies who were within the closed limousine, and also by a Mr. Van Gordon, who was sitting upon the porch of his residence a hundred yards away from the scene of the collision. It also appeared that the body of Zapata had been carried along by the defendant's car for a distance of from forty-five to sixty feet before falling from it to the roadside; while from the exhibits produced at the trial and exhibited to this court upon the oral argument of this appeal, consisting of photographs of the defendant's car, and also of articles of clothing worn by one of the occupants thereof sitting on the side nearest to the point of contact, it appeared that the fenders and tool-box of the defendant's car had been bent and indented by the impact, while the sides of the machine and the coat of its said occupant were bespattered with the blood and brains of Zapata.

It would thus appear that the evidence before the jury was abundantly ample to justify the defendant's conviction. Notwithstanding this fact, the appellant insistently contends that the judgment of conviction herein should be reversed on account of certain alleged acts of prejudicial misconduct on the part of the district attorney occurring during the trial and the argument of the case and claimed to have resulted in a miscarriage of justice. The specific acts of alleged misconduct relied upon for a reversal substantially stated are these:

During the trial of the cause and prior to the time when the defendant himself had taken the stand as a witness in his own behalf his counsel proffered proof that his general reputation for truth, honesty, and integrity was good. The trial court, upon objection made, limited the evidence offered in this regard to proof of the general reputation of the defendant for kindness and gentleness, as being the particular qualities involved in the particular inquiry. The defendant apparently accepted this limitation; and proceeding upon the theory that it would be unlikely that a person of gentle and kindly nature would disregard the promptings of humanity as well as the commands of the law requiring him to stop and render aid to those who might be injured by a collision if he was aware of the fact or likelihood of such injury, the defendant called several witnesses, who testified that the general reputation of the defendant for kindness and gentleness was good. Of the witness George Filmer the district attorney asked upon cross-examination whether he had ever heard it discussed that the defendant, with several other poultry-men of San Francisco, had been arrested for picking chickens alive. The same question was asked of each of the other witnesses to the defendant's general reputation for kindness and gentleness. A number of these replied to the questions that they had never heard the matter discussed; while others stated that they had heard of it, but had investigated it and found that the rumor had no foundation in fact. The district attorney also asked of most, if not all, of said witnesses if they had not heard that the defendant had run down a boy or a man upon the streets of San Francisco and been arrested for it, to which most of them replied that they had never heard of it. Of some of said witnesses the district attorney also inquired if they had not heard of the defendant's arrest for unlawfully

killing an elk. To this line of questions in most instances no objection or assignment of misconduct was made at the time, nor was the good faith of the district attorney in asking these questions assailed at the trial; and it seems very clear that the questions themselves had a direct bearing upon the issue as to the particular qualities of the defendant to which these several witnesses were called to testify, and that, in the absence of a showing of bad faith on the part of the prosecuting officer, they were within the proper bounds of his cross-examination. The district attorney also asked of a number of said witnesses whether they had heard that the defendant had on several occasions been arrested for speeding his automobile beyond the legal limit, and in some instances had pleaded guilty and paid fines therefor. In most cases this question was asked and answered negatively without objection or assignment of misconduct. It may be seriously questioned whether a person habituated to reckless driving of an automobile to the extent of being in a number of cases and in several counties arrested therefor is of that kindly and humane disposition which the character witnesses of the defendant herein would have had the jury believe him to be; but however this may be, it appears, as above stated, that in most instances no objection or assignment of misconduct was made to these questions, and that also in most cases the witnesses stated that they had never heard of the matter, and in some instances the witnesses admitted that they had heard of these episodes. It further appears from the record that no request was made to the court for an admonition to the jury to disregard this evidence; nor was any instruction to that effect requested; nor was the good faith of the district attorney in making these inquiries at the time brought into question. Under these circumstances no prejudicial error can be predicated upon the action of the district attorney in making, or of the court in permitting, the inquiry as to whether the character witnesses for the defendant knew of his arrests and pleas of guilty and fines for unlawful speeding.

The district attorney is also charged with misconduct in asking several of said witnesses whether they had heard it discussed that the defendant was under investigation by the police department of San Francisco for the selling of several stolen automobiles. The question was improper, and the action of the district attorney in asking it an act of misconduct

on his part; but the record shows that the court in each instance sustained the defendant's objections to the question, and further shows that while the defendant's counsel assigned the act of the district attorney as misconduct, no request was made of the court to admonish or instruct the jury to disregard the same. Notwithstanding this, the court of its own motion gave the jury the following instruction: "Offers of testimony by either counsel which the court refused to admit in evidence, and answers given by witnesses which may have been stricken out by the court, are not evidence, and should be disregarded by you. It sometimes happens that counsel asks a question of a witness which contains an insinuation against one or other party to the action. The insinuations contained in such questions are not evidence, and you must disregard them." It is to be assumed that the jury heeded this admonition with respect not only to this precise inquiry, but also as to other questions of doubtful propriety respecting which objections were made and sustained by the court. (*People v. Burke*, 18 Cal. App. 72, [122 Pac. 435].)

The district attorney is also charged with misconduct in having asked of the witness Charles Swanberg the following question: "Q. Did you ever hear it discussed, Mr. Swanberg, that on the day of this affair he [the defendant] was visiting at the home of a person who had been arrested as a member of the Black Hand Society?" Before objection could be made the witness responded, "I never heard it discussed." The defendant then made his objection and assignment of misconduct; whereupon the court stated to the counsel for the defendant, "If you wish it will be stricken out." No such request was made, however, nor was the court asked to either admonish or instruct the jury, nor was the district attorney charged with bad faith in making the inquiry. It is sufficient to say, therefore, that since the defendant chose to allow the question and answer to stand, and made no request for an admonition or instruction to the jury to disregard it, no prejudicial misconduct sufficient to justify a reversal of the case can be predicated upon the asking of the question.

The appellant further contends that the district attorney was guilty of misconduct in producing a justice of the peace of San Mateo with his docket, for the purpose of showing affirmatively that the defendant had in fact been arrested, and

pleaded guilty and paid a fine upon the charge of unlawful speeding. It is sufficient to say that the evidence was incompetent, and its proffered introduction improper, but that the court promptly sustained an objection to it, and that the defendant neither assigned the proffer of it as misconduct nor asked for an instruction to the jury to disregard it. The error and impropriety of its offer in evidence must therefore be held to have been cured by the foregoing voluntary instruction of the court in its final charge to the jury.

With regard to the alleged acts of misconduct on the part of the district attorney during the argument of the case, we do not deem it necessary to deal with these in detail, for the reason that in most instances the court admonished the district attorney to confine himself to the evidence in the case; and for the further reason that upon the whole these imprudent remarks of the district attorney were not in our opinion sufficiently prejudicial to have seriously affected the verdict or to warrant a reversal of the case; particularly in view of the fact that, as above stated, the proof presented to the jury in the form of testimony and exhibits was amply sufficient to justify the verdict of conviction, and to warrant the conclusion that none of the several alleged acts of misconduct on the part of the prosecuting officer were sufficiently prejudicial in character or influential in effect as to cause the verdict of conviction in this case to have been a miscarriage of justice.

The final contention of the appellant is that the section of the Penal Code under which the defendant was prosecuted and convicted is unconstitutional, for two alleged reasons: First, that the section does not expressly embody in its phraseology words limiting its application to those persons who *knowingly* cause their vehicles to collide with those occupied by others. But our reading of the section in question convinces us that the element of knowledge of the fact of the collision is necessarily to be implied from the requirements of the act, to the effect that drivers of such vehicles must stop and render aid to those who may possibly have been injured in the collision. Moreover, section 20 of the Penal Code, which is to be read together with and into the section under review, provides that "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." We are of the opinion that the act is not unconstitutional for the first reason assigned.

The appellant urges as the second reason for its alleged invalidity its provision requiring the driver or occupant of a vehicle striking another to give certain information as to the number of the vehicle, the name and address of the driver and of the owner and of its passengers. It is claimed that this requirement, by compelling the persons of whom such information is demanded to be witnesses against themselves, amounts to a violation of section 13 of article I of the state constitution. But the appellant concedes that this point has been decided adversely to his contention in a number of cases from other states which, as respondent shows, have been approved by this court in the case of *People v. Diller*, 24 Cal. App. 799, 802, [142 Pac. 797]. There is therefore no merit in this contention.

Judgment and order affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 16, 1917, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 13, 1917.

[Civ. No. 1616. Second Appellate District.—February 14, 1917.]

FLORENCIA DILGER, a Minor, etc., Respondent, v. C. F. WHITTIER, Appellant.

NEGLIGENCE—COLLISION OF AUTOMOBILES—INJURY TO MINOR—APPEAL—

RECORD—PRESUMPTION.—In an action for damages for personal injuries sustained by a child as a result of being struck by an automobile, which was diverted from the roadway and precipitated against her by reason of colliding with another automobile operated by the defendant, it will be assumed on appeal that the jury was justified in finding that the injury was due solely and alone to defendant's negligence in operating his car, where the evidence touching the action of the parties in the operation of their cars was conflicting, and the plat of the location and position of the cars used by the witnesses in testifying not brought up on the appeal.

ID.—EVIDENCE—SPEED OF CAR.—In such an action an objection that a witness who was allowed to testify as to the speed of defendant's car had not seen the car in sufficient time prior to the accident to testify on the subject goes to the weight, rather than to the competency, of the evidence, and its admission is not error where it differed but little from the evidence offered by the defendant on the subject.

APPEAL from a judgment of the Superior Court of Kern County, and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

George E. Whitaker, for Appellant.

Rowen Irwin, and Fred L. Seybolt, for Respondent.

SHAW, J.—This is an action brought by plaintiff, a minor four years of age, to recover damages for personal injuries sustained while playing in a vacant lot adjoining her father's place of business, as a result of being struck by an automobile driven by one Earl Oldham, which, it is claimed, was diverted from the roadway and precipitated against plaintiff by reason of colliding with another automobile negligently operated by defendant. The case was tried by a jury, which rendered a verdict for plaintiff in the sum of one thousand dollars, for which judgment was entered in her favor, and from which, and an order denying his motion for a new trial, defendant appeals.

Appellant's chief contention is that the verdict is not justified by the evidence, in that it fails to show that defendant was guilty of any negligence in operating his car, but, on the contrary, shows that the injury sustained was due to Oldham's negligence.

Not only is the evidence touching the action of both Oldham and defendant in operating their respective cars conflicting, but the plat of the location and position of the cars used by the witnesses in testifying is not before us; hence much of the testimony is meaningless. No purpose could be served by an extended reference to the conflicting evidence. Suffice it to say, there appears to be testimony which *tended* to show and which, when illustrated by the plat in connection with which it was given, *might*, and therefore since it is not brought up

we must assume that *it did*, clearly justify the jury in finding that the injury was due solely and alone to defendant's negligence in operating his car.

The accident occurred in the unincorporated town of Fellows, in Kern County, through which a highway, known as the Midway Road, extended north and south. The father of the plaintiff, W. J. Dilger, had a place of business on the east side of this highway, which, between the sidewalks, was some forty-seven feet in width. Adjoining Dilger's place of business on the north were two vacant lots, on one of which and next to the northwest corner of her father's house plaintiff was playing. Defendant was driving a Cadillac car on the *right-hand side* of this highway, going in a southerly direction at a speed of some twenty or twenty-five miles per hour, and Oldham, driving a Ford car, was closely following a Santa Fe car going northerly and traveling near the center of the roadway. At a point about opposite Dilger's place, defendant met the Santa Fe car, when, instead of passing it to the right, he turned to the left thereof, and when clear of the Santa Fe car met the one driven by Oldham, who, while in the rear of and close to the Santa Fe car, was nearer to the sidewalk on his right. At the time it appears that Oldham was traveling at a speed of five miles per hour, and, seeing defendant approaching at a high speed immediately in front of him on the wrong side of the highway, turned sharply to the right, toward the vacant lot, in an effort to escape, when defendant's car collided with the side of the Ford machine, projecting it some fifteen feet against the child on the vacant lot. Presumably the jury concluded the accident would not have occurred had defendant observed the law of the road which required him to pass to the right of the Santa Fe car. On the other hand, Oldham, since he was operating his car slowly on the side of the street to which he was entitled, was not, as shown by the record, guilty of any negligence which contributed to plaintiff's injury. It devolves upon an appellant to affirmatively show prejudicial error. Upon the record presented it cannot be said there is an absence of sufficient evidence to justify the verdict of the jury, which we must presume, in the absence of the instructions, copy of which is omitted from the record, was properly instructed as to the law applicable to the case.

Basing his claim upon the fact that W. J. Dilger's view of defendant's car prior to its colliding with that of Oldham was not of sufficient length as to time as to enable him to testify upon the subject, appellant insists the court erred in permitting him to testify that it was running at a speed of twenty to twenty-five miles per hour. In our opinion, the objection goes to the weight rather than to the competency of the evidence, which differed little, if any, from evidence upon the same subject offered by defendant. In no event could it have affected the verdict.

The court, over defendant's objection, permitted plaintiff to introduce in evidence the torn clothes of the child and to testify as to tears and rents therein. While the evidence was immaterial, inasmuch as it did not tend to show either negligence on the part of defendant or injuries to the child, nevertheless it is impossible to conceive how defendant could have been prejudiced by the ruling. Surely the dress shown to have rents in it was not calculated to appeal to the passions of the jury to such an extent as to cause it to render a verdict for excessive damages; nor is the verdict in this case, when the child's injuries are considered, subject to such objection.

One of the appellant's grounds of motion for a new trial was surprise which ordinary prudence could not have guarded against, in support of which defendant filed the affidavit of his attorney, from which it appears that at some time—whether before or pending the trial is not shown—he placed in the hands of the sheriff of Kern County for service a subpoena for Earl Oldham and one Mait Smith, both of whom, it was claimed, would give material testimony in favor of the defendant; that diligent search was made by said sheriff for said witnesses, without success. No facts are stated from which the court could determine what effort the sheriff made to serve the subpoena, and from aught that is shown to the contrary, defendant did not place the subpoena in the hands of the sheriff with instructions to serve it until the trial was commenced. It cannot be said there was any abuse of discretion on the part of the court in denying the motion upon such ground.

Finding no prejudicial error in the record, the judgment and order appealed from are affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2201. Second Appellate District.—February 14, 1917.]

**ADOLPH RAMISH, Respondent, v. ELMER N. WORKMAN
et al., Appellants.**

LANDLORD AND TENANT—AMOUNT PAID IN ADDITION TO RENT—BONUS—CONSTRUCTION OF LEASE.—Under a lease of property for the term of ten years providing that the lessees "will pay to the lessor as a further consideration for this lease in addition to the rent hereinabove reserved the sum of \$7,200, receipt of which is hereby acknowledged by the lessor," and that, if the lessees should pay the rent reserved when due, and perform and observe the agreements of the lease for the first nine years, seven months, and twelve days, and the lease shall not be terminated within such period by the re-entry of the lessor, he will credit the sum of seven thousand two hundred dollars upon the remainder of the term, such sum is not to be construed as security for the payment of the rent reserved during the time ending with the eviction of the lessees for non-payment of rent and any damages sustained, but as in the nature of a bonus or additional consideration for the lease of the premises.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Lewis R. Works, Judge.

The facts are stated in the opinion of the court.

Williams, Goudge & Chandler, I. Henry Harris, and Daniel M. Hunsaker, for Appellants.

Olin Wellborn, Jr., and Alfred H. McAdoo, for Respondent.

SHAW, J.—This controversy grew out of a lease of property made by plaintiff to defendants Workman and Sturm and their assignors, for a term of ten years, for the sum of one hundred and eighty thousand dollars, payable in advance in monthly installments of one thousand five hundred dollars.

Default was made in the payment of the rent due December 1, 1912, whereupon plaintiff instituted a proceeding in unlawful detainer for restitution of the property and recovery of the rent then due for said month, for which judgment was rendered on January 31, 1913, pursuant to which, notwithstanding an appeal perfected therefrom by defendants, they were evicted from the property on February 10th following.

The present action, filed April 26, 1913, was to recover the rent for the period extending from January 1st to February 10th, during which the premises were held and occupied by defendants, and for which judgment in the sum of two thousand dollars was rendered in favor of plaintiff, from which, and an order denying their motion for a new trial, both Workman and Sturm, as defendants, and the former also as cross-complainant, appeal.

The lease provided, among other things, that upon default in payment of the rent reserved, the lessor, at his option, might enter upon the demised premises and remove all persons therefrom. By another provision it was agreed that the lessees "will pay to the lessor as a further consideration for this lease in addition to the rent hereinabove reserved the sum of seventy-two hundred dollars, receipt of which is hereby acknowledged by the lessor"; and "that if the lessees shall pay the rent herein reserved when the same becomes due hereunder, and shall well and truly perform and observe all the covenants and agreements herein contained on their part to be performed and observed, during the first nine years, seven months and twelve days of this lease, and this lease shall not be terminated by the re-entry of the lessor as hereinafter provided within said period of nine years, seven months and twelve days, he will credit the sum of seventy-two hundred dollars hereinafter provided to be paid to him by the lessees upon the last four months and eighteen days' rent under this lease."

While appellants admit that they occupied the premises during the month of January and up to February 10th, the rent for which period under the terms of the lease was two thousand dollars, they insist their obligation to pay the same was fully adjudicated in the action for unlawful detainer, wherein judgment was rendered for one thousand five hundred dollars, which judgment they claim constituted a bar to the maintenance of this action. At the trial it was in substance stipulated that in the unlawful detainer action no claim was made for any damages, nor for rent, other than one thousand five hundred dollars due for the month of December, for which and the restitution of the premises judgment was rendered, but not executed as to restitution until February 10th. The action did not involve the rent for the period extending from January 1st to February 10th, nor was there any judgment

therefor rendered. Moreover, this judgment was not final, for the reason that an appeal was perfected therefrom, and hence, there being no final determination of the question as to plaintiff's right to forfeit the lease, the question was left as though it had never been tried, even though no stay was directed by the court as provided in section 1176 of the Code of Civil Procedure. Hence, so long as defendants continued to occupy the premises, pending the final determination of the action for unlawful detainer, the lease constituted the measure of their liability for such time as they remained in possession.

Appellants' chief ground for a reversal, and upon which they devote much of their argument, is based upon the provision of the lease pursuant to which they paid plaintiff seven thousand two hundred dollars, claim to which is asserted in both the answer and cross-complaint. Notwithstanding the plain language in which the provision is couched, the meaning of which, to our minds, admits of no controversy, they insist that it should be construed as security for the payment of the rent reserved during the time ending with their eviction and any damages sustained by plaintiff; that when the landlord elected to evict defendants from the premises for nonpayment of rent he waived all claim to the seven thousand two hundred dollars, except in so far as it was necessary to apply it in payment of rent then due or accrued. As stated in *Dutton v. Christie*, 63 Wash. 373, [115 Pac. 857], where a similar question was involved: "We cannot agree with this contention without in effect writing a new contract for the parties." Clearly, the seven thousand two hundred dollars was paid for a ten-year lease of the premises, upon the conditions and terms specified therein. Defendants parted with the money, not as a penalty or as security, but as a payment the consideration for which was the execution of the lease on the part of plaintiff. The title thereto passed absolutely to the lessor, unaffected by the fact that he agreed, upon the performance of certain conditions by defendants, to give them credit therefor. The conditions were never performed by defendants, and hence they could have no claim to the fund. The authorities which appellants cite in support of their contention all appear to have been cases where the deposit was made with the lessor upon the execution of the lease as security for the payment of the rent, and in such cases, upon the lessor evicting the tenants, it is uniformly held that he cannot assert

claim to the amount so deposited, over and above rent due, with damages sustained. The cases cited by appellants involve deposits made as "a guaranty," "as indemnity," as "a penalty," "for security," etc., and hence are readily distinguished from the case at bar. This view finds full support in the case of *Dutton v. Christie*, 63 Wash. 373, [115 Pac. 857].

The provisions of the lease in question hereinbefore quoted should be interpreted in accordance with the plain import of the language used, and thus construed it is clear that the parties intended the seven thousand two hundred dollars to be in the nature of a bonus or additional consideration paid the lessor as an inducement to make the lease upon the terms and conditions therein contained; and, as stated, the fact that upon the performance of all the covenants and agreements contained in the lease to be performed by the lessees during the first nine years, seven months, and twelve days of the term thereof, he promised in effect to release them from the payment of rent at the rate of one thousand five hundred dollars per month for the last four months and eighteen days of the term so demised, furnishes no reason for appellants' contention.

The judgment and order appealed from are affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 12, 1917.

[Crim. No. 527. Second Appellate District.—February 14, 1917.]

**THE PEOPLE, Respondent, v. GEORGE W. GILBRETH,
Appellant.**

CRIMINAL LAW—NEW TRIAL—FAILURE TO PRONOUNCE JUDGMENT WITHIN STATUTOORY TIME.—Under the provisions of sections 1191 and 1202 of the Penal Code, a defendant in a criminal action is entitled to a new trial, where an application for probation is made, and the time for hearing the application and for pronouneing judgment extended several times, and the application finally denied and judgment pronounced thirty-three days after the date of conviction.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

A. A. Sturges, Waldo, Root & Dysert, and G. E. Waldo, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

JAMES, J.—The defendant, by verdict of the jury returned on the fourteenth day of September, 1916, was found guilty of the crime of embezzlement, a felony. He made oral application for release on probation, and the court, without request or consent of the defendant, fixed the time for hearing of this application and for pronouncing judgment at September 28, 1916. On September 28th, at the request of defendant, time was extended to October 5th. Another extension was made from October 5th to October 10th, at the request of defendant. On October 10th, however, without the request of defendant, time was extended to October 17th, which was thirty-three days after the date of conviction. The court at the latter time denied the application for probation, and the defendant then made his motion for a new trial, the principal ground being that, under the provisions of sections 1191 and 1202 of the Penal Code, the court had no jurisdiction to pronounce judgment. Sentence being pro-

nounced, this appeal was taken from the judgment and from the order denying the application for a new trial.

The requirement of the provisions of section 1191 of the Penal Code, which limits the time for the pronouncing of judgment after conviction, has been before this court and the district court of appeal for the first district heretofore. These provisions have been construed to be mandatory in effect and designed to produce speedy determination of criminal proceedings in the trial court. We refer to the cases of *People v. Winner*, 31 Cal. App. 352, [160 Pac. 689, 23 Cal. App. Dec. 331], and *People v. Boling*, 32 Cal. App. 42, [161 Pac. 1169]. The views of this court as declared in the decision first mentioned are in harmony with those which find place in the opinion in the Boling case, which was decided in the first district. In the Boling case there was a petition for rehearing in the supreme court, which petition was denied, thereby giving the adjudication final approval. On the authority of the cases cited, defendant, the appellant here, is entitled to a new trial.

The judgment and order are reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 2210. Second Appellate District.—February 16, 1917.]

JAY H. POTTER, Respondent, v. BACK COUNTRY TRANSPORTATION COMPANY (a Corporation), Appellant.

NEGLIGENCE — PERSONAL INJURIES — CONFLICT OF EVIDENCE — APPEAL — VERDICT CONCLUSIVE.—In an action to recover damages for personal injuries, where the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff is in conflict, the appellate court is bound by the determination of the jury.

ID.—INSTRUCTION—FAILURE TO GIVE—APPEAL.—An appellant may not on appeal for the first time take advantage of the trial court's failure to give some specific instruction, if he presented no such instruction to that court.

ID.—DOCTRINE OF LAST CLEAR CHANCE—RIGHT TO INVOKE.—The doctrine of "last clear chance" can be invoked only in favor of the person who is injured.

APPEAL from a judgment of the Superior Court of San Diego County. C. N. Andrews, Judge.

The facts are stated in the opinion of the court.

Morganstern, McGee, Henning & Hendee, and Doolittle & Morrison, for Appellant.

Kirk & Kirk, and E. E. Kirk, for Respondent.

CONREY, P. J.—The action is one to recover compensation for personal injuries which resulted from a collision between plaintiff and an automobile driven by a servant of the defendant. Pursuant to the verdict of a jury, judgment was entered in favor of the plaintiff, and the defendant appeals therefrom.

There is evidence tending to show the following facts: Late in the afternoon of November 16, 1913, the plaintiff was walking across and toward the west side of Fourth Street, in the city of San Diego. After passing the middle of the street he saw defendant's car coming toward him at a distance of not more than 150 feet and at the rate of about twelve miles per hour. Observing that the automobile was changing its direction, the plaintiff took a step backward, checked himself, and then started backward again. Thereupon the automobile turned again toward the plaintiff and struck him. It knocked him about eight feet, ran upon his leg and broke it, then reversed, and backed away. If these were the facts, they were sufficient to authorize the jury to find in favor of the plaintiff upon his charge that the defendant wrongfully, unlawfully, carelessly, and negligently struck the plaintiff with its automobile, whereby the plaintiff was injured. This is so, notwithstanding testimony tending to show that the plaintiff was intoxicated and that the plaintiff ran back into the path of the automobile after he had gotten across and out of danger. These were disputed facts, and the question of negligence of the defendant, and also the question of contributory negligence of the plaintiff, were questions of fact to be determined by the jury in accordance with their belief derived from the testimony presented. The testimony of the plaintiff and his witnesses as to these matters was in conflict with the testimony of the witnesses produced by the defendant, and

we are bound by the jury's determination of the facts. It may be noted by the way that the driver of the automobile was not a witness at the trial, although there is evidence indicating that his testimony could have been obtained. Appellant insists that it should not be held liable for the injury which plaintiff "sustained by suddenly stepping in front of defendant's automobile." The difficulty with this proposition is that, according to the testimony which the jury had a right to believe and did believe, the injury was not thus sustained.

Numerous objections are urged with respect to the instructions given by the court to the jury. These criticisms refer to an instruction defining negligence; to alleged failure of the court to give direction to the jury to find the circumstances surrounding the occasion under consideration, or the measure of care owed by the defendant to the plaintiff under those circumstances; to the alleged failure to instruct the jury that if the plaintiff stepped in front of the automobile so close to it that there was not sufficient time in which the appellant could have prevented it from striking plaintiff, there was no duty on the defendant to avoid the accident, the failure to perform which duty is legal negligence; to alleged comments on the evidence, which appellant claims were charges to the jury upon matters of fact; to alleged errors of instructions to the jury upon the duty and obligation of the defendant toward plaintiff upon the theory that plaintiff had been placed in a position of emergency and of sudden and unexpected danger; to an alleged erroneous instruction upon the doctrine of "last clear chance"; to ambiguity and confusion in the instructions as a whole; to alleged errors in instructions upon the measure of damages.

The record shows that the court refused to give instructions which were offered by the respective parties, but does not show what these instructions were. And we do not know how far the instructions given by the court on its own motion were inconsistent, or that they were inconsistent at all, with those requested by the appellant. With regard to omissions to give instructions, we need say no more than that an appellant may not here for the first time take advantage of the trial court's failure to give some specific instruction, if he presented no such instruction to that court. (*Henderson v.*

Los Angeles Traction Co., 150 Cal. 689, 697, [89 Pac. 976]; *Hardy v. Schirmer*, 163 Cal. 272, 275, [124 Pac. 993].)

We find no prejudicial error in the instructions as given. Since a recital of those instructions would not raise any novel question of law or deal with any unusual application thereof, we shall not prolong the discussion very much beyond a general statement of our conclusions upon the objections presented, or set forth in detail our concurrence with appellant as to various inaccurate words and phrases which do not in any important sense affect the court's statement as a substantially correct exposition of the law. Notwithstanding these inaccuracies, the instructions contain a fair statement of the doctrine of negligence; of the rule requiring ordinary care on the part of the defendant to avoid injuring the plaintiff and requiring ordinary care on the part of the plaintiff to avoid exposing himself to injury; and of the rules governing the measure of damages. The language of the court in referring to the testimony did not in any instance amount to a statement of the judge's opinion upon any disputed fact; but, on the contrary, he directed the jury that in determining the facts they were not even to draw any hints or inferences from any statement made by him. There was testimony tending to show that by the change of direction of the automobile the plaintiff was suddenly placed in peril, and therefore the court was authorized to give the jury an instruction as to the duty of plaintiff under circumstances of sudden and unexpected danger.

Complaint is made that the court stated that the doctrine of the last clear chance "has no application to the acts of the plaintiff in this case, so far as the circumstances involved in this case are concerned," and then proceeded to instruct on the subject on the contrary theory. The instruction as a whole is uncertain and confusing in its terms, and finally states that "if you see fit to apply the last clear chance to plaintiff's actions, if you should believe that the plaintiff discovered that the automobile was in danger of being run into by him, or put in a place of danger, where it might suddenly be called upon to swerve and cause danger to itself or its driver, and that the plaintiff discovered that that danger was not apprehended or understood by the driver, and that he could by the exercise of ordinary care, avoid it, or by the exercise of a high degree of care, avoid it, it was his duty to

avoid it. I suppose the same rule does apply to both parties." It does not seem that appellant could have been injured by this instruction. As there was no injury to the automobile or to its driver, the last foregoing quoted statement hit only the viewless air, so far as this case is concerned. And there was no error in the court's earlier statement that the doctrine of last clear chance had no application to the acts of the plaintiff in this case. For, "strictly considered, this doctrine can be invoked only in favor of the person who is injured." (*Spear v. United Railroads*, 16 Cal. App. 637, 659, [117 Pac. 956].)

Counsel for appellant state in their brief that the defendant has appealed from the judgment and from an order denying its motion for a new trial. The transcript does not show that there is any appeal, other than from the judgment. The judgment is affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1624. Third Appellate District.—February 16, 1917.]

ANNA SCHALLMAN, Respondent, v. CARL F. HAAS, Appellant.

PARENT AND CHILD—SUPPORT OF ILLEGITIMATE CHILD—ACTION BY MOTHER—SUPPORT PENDING APPEAL.—In an action brought by a mother of an illegitimate child to compel its alleged father to pay a monthly sum reasonably necessary for the support, maintenance, and education of the child, the trial court has no inherent power, as in actions for divorce where the marriage is admitted, to compel the father to pay to the mother the costs necessary to resist an appeal taken by the father, or to compel the father to support the child pending the appeal, as no such obligation arises until the paternity of the alleged illegitimate child is established.

ID.—CONSTRUCTION OF CODE PROVISIONS.—Section 196a of the Civil Code, requiring the father of an illegitimate minor child to give it support and education suitable to his circumstances, and authorizing a civil suit in behalf of the child by the mother to enforce such obligations, and giving the court power to enforce performance of such obligations the same as under sections 138, 139, and 140 of the Civil Code, in a suit for divorce by a wife, does not, by making the latter named

sections a part of section 196a, impose the obligations provided by such sections upon the defendant in an action to compel the support of an illegitimate child, but the sole purpose of such incorporation was to provide a full and complete remedy for the enforcement of the obligations when established.

APPEAL from an order of the Superior Court of the City and County of San Francisco directing payment of costs and counsel fees pending appeal from a judgment directing support of an illegitimate child. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

tum Suden & tum Suden, for Appellant.

Henry H. Davis, for Respondent.

HART, J.—This action was commenced for the purpose of obtaining a decree or judgment compelling the defendant to pay a monthly sum reasonably necessary for the support, maintenance, and education of the alleged minor child of the parties.

The complaint, in substance, alleges: That the plaintiff is the mother and the defendant the father of a minor child, who was born in the city and county of San Francisco, on the twenty-sixth day of July, 1911; that the defendant has failed, neglected, and refused for several months immediately preceding the time of the commencement of this action to provide for said minor child's support and maintenance; that the plaintiff is wholly without the means to provide for and maintain said minor child, being able only, through her own personal labors and work, and with the assistance of relatives, to provide for herself the common necessities of life; that "the defendant has and possesses the present means and ability to pay to plaintiff a reasonable sum for the support, maintenance and education of said minor child, together with a reasonable sum as and for plaintiff's counsel fees and costs of court."

The prayer is for judgment requiring the defendant to pay to plaintiff a reasonable sum monthly for the support, etc., of said child, together with a reasonable sum for plaintiff's counsel's fees and cost of court herein.

The answer denies each and every one of the above stated allegations of the complaint, and avers in paragraph 3 therof:

"Defendant alleges that he is under no legal liability or responsibility whatever to provide for the maintenance and support of the said minor child, Albert Schallman; that said Albert Schallman was born out of wedlock."

The court found that the plaintiff and the defendant were the mother and father, respectively, of the minor child referred to in the complaint; that the defendant has failed, neglected, and refused to provide said child with support, maintenance, etc., as alleged in the complaint; that, as likewise alleged, the plaintiff is wholly without the means, and that the defendant possesses sufficient means and ability to provide such support, maintenance, etc., for said child. Finding 6 reads: "That all the facts set forth in defendant's answer herein contrary to these findings are untrue."

Within due time, the defendant duly served and filed a notice of appeal to the supreme court from said judgment, and to stay the execution thereof gave a bond in the sum of one thousand six hundred dollars, to which no exception was taken, and which covers a sum which would accrue within a period of approximately three years, should the judgment be affirmed. (*Sharon v. Sharon*, 67 Cal. 185, [7 Pac. 456, 635, 8 Pac. 709].)

Thereafter the plaintiff noticed and filed an application to the trial court for an order allowing her costs and attorney's fees to cover the expense for transcribing the testimony taken at the trial, to be used on the motion of the defendant for a new trial and upon the appeal from the judgment, for the printing of briefs on the appeal, for compensation of her counsel in those proceedings, and further asked for an order requiring the defendant to pay to plaintiff a reasonable sum for the support and maintenance of the said child "pending the determination of defendant's motion for a new trial and decision of defendant's proposed appeal to the supreme court herein."

Upon hearing the above-mentioned motion, the court made an order allowing the same, as follows, briefly: That the defendant immediately deposit with the clerk of the court the sum of \$150, to be expended in the payment of such costs, charges, and disbursements "as may be necessary for plaintiff's costs and expenses in preparing her amendments to defendant's bill of exceptions and all of her costs necessary to be expended by her in preparation on her part against de-

fendant's said motion for a new trial herein and defendant's appeal herein"; that defendant pay to plaintiff the sum of \$75 as and for her counsel fees on said motion for a new trial and defendant's appeal herein; that, pending the hearing of said motion for a new trial and appeal and the final determination of both, the defendant pay to the plaintiff the sum of \$20 per month for the support and maintenance of said minor.

The defendant took an appeal from said order, and filed a bond to stay the execution thereof. It is the appeal from said order with which we are here concerned.

The bill of exceptions in the transcript does not contain the judgment-roll. It states, however, that, at the hearing of the application for the order from which this appeal is prosecuted, the defendant *offered* in evidence the judgment-roll. It is quite probable that the judgment-roll was, as a matter of fact, received in evidence, but that, under the decision in *Harron v. Harron*, 128 Cal. 303, [60 Pac. 932], it was deemed unnecessary to incorporate it in the bill. The notice of the motion in this case stated that said motion "will be made upon this notice of motion and upon all of the pleadings and papers filed herein and on all of the proceedings had and taken herein, and upon such oral and documentary evidence as may be produced upon the hearing hereof." The order appealed from here was made by the judge who tried the case upon the merits and rendered the judgment thereon. The record in the case was judicially before the court upon the motion, and, in the hearing thereof, it took, as it had a right to do, judicial notice thereof. (*Harron v. Harron*, 128 Cal. 303, [60 Pac. 932].)

The action purports to be based upon section 196a of the Civil Code, which reads: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

It is vigorously argued by the defendant that the complaint does not state a cause of action under said section, and that the findings, which follow substantially the averments of the

complaint, do not support the judgment. It is further claimed that the complaint on its face shows that the minor child therein referred to and not the plaintiff is the real party in interest in this action, and for this reason said pleading fails to state the existence of a right of action in the plaintiff upon the cause of action so stated. We recognize much merit in the first stated of these contentions. As to the second we intimate no opinion, since we do not find it necessary to consider it on this appeal. Indeed, we prefer not to consider either of said points, inasmuch as there is, it appears, an appeal from the judgment pending and supported by some other record which is not here, and it is preferable that the questions suggested should be disposed of on said appeal.

We think the court transcended its power in making the order complained of here. To our minds, the whole question whether a trial court is legally authorized to make such an order after judgment in an action based upon section 196a of the Civil Code must be determined upon a consideration of statutory law, conceding that it is within the competence of the legislature to confer such power upon trial courts in a case like this. In other words, the power of the court to make such an order is not inherent, but, if it exists and can exist at all, it must come from direct legislative authority. The soundness of this proposition cannot well be challenged.

It is doubtless true that, in actions for divorce (and it will be understood that we are now referring to cases of that character wherein there is no contested issue of marriage—that is, wherein the marriage is not denied), even in the absence of statutory regulation of the matter or express legislative authority therefor, the courts having cognizance of such causes have the power to make after judgment suitable and reasonable provision for temporary or permanent alimony or support and provision for the payment by the husband to the wife of such sums as may be found to be requisite to defray the expenses necessary to be incurred by her in prosecuting the action or defending against it at the trial or in prosecuting or resisting the appeal, if one be taken. This power naturally follows from the nature of the marriage relation and the rights and duties of the parties thereupon arising, and from the fact that an action for a divorce is for the purpose of dissolving that relation. The husband upon the marriage becomes the head of the family, and has exclusive con-

trol, under certain restrictions as to disposition, of the community property. As a rule, he alone holds the "purse strings," and this is true even where the principal sources of his income are the property or belongings of the community. But, even if there be no community property and the wife is without separate means, the authority of the court to compel the husband after judgment to pay to the wife such sum or sums as may reasonably be required to prosecute or resist an appeal and for the support of their minor children pending the appeal will be recognized. "Natural justice and the policy of the law," says Mr. Bishop, in his work on Marriage and Divorce, volume 2, section 976, "alike demand that in any litigation between husband and wife, they shall have equal facilities for presenting their case before the tribunal. This requires that they should have equal command of funds. So that if she is without means, the law having vested (given control of) the acquisitions of the two in (to) him, he should be compelled to furnish them to her, to an extent rendering her his equal in the suit. This doctrine is a part of the same whereon proceeds temporary alimony. And so the English courts have from the earliest times to the present held without the aid of parliament, and nearly all of our own have accepted the doctrine as of common law."

Of course, where the matter of costs, attorney's fees, and temporary or permanent support is regulated by statute, then the rules so promulgated must govern, and, undoubtedly, where, in a divorce action, a trial court failed to follow the statute in the matter of awarding costs, etc., or transcended its authority under the statute in that regard, its action therein would be annulled or set at naught upon appeal as being void or beyond the jurisdiction of the court. In this state, as well as in most of the states at the present time, the matter of costs, attorney's fees, and alimony, in divorce actions or suits for maintenance and support, is entirely regulated and governed by statute.

But there is no analogy between divorce suits or any other action between a husband and wife pertaining to or involving their marital relation and obligations and an action founded upon section 196a of the Civil Code. No more than in any other of the various classes of actions has a court the inherent power, if, indeed, it can have or be given any power in that respect at all, to require a litigant in a case of this char-

acter to provide his adversary with the means necessary to defray the costs and expenses incident to the prosecution or resisting of an appeal or for the support of such adversary, pending the disposition of the cause on appeal. This proposition necessarily follows from the fact that the essential issue to be determined in an action of this kind is contested. The gist or gravamen of this action is the paternity of the alleged illegitimate child. The defendant entered the court denying that he was the father of the child. His legal liability for its support can, therefore, only be fixed by proof that he is the father. There is not as to the defendant and the infant, as is true in divorce actions, wherein the marriage is admitted or not denied, a fixed and admitted status upon which the court is authorized to exercise a power whereby a decree affecting the rights of the parties may be made in advance of the trial of the issues of fact or in the absence of proof. Nor is it any less true in this case than in any other action, except in suits for divorce and kindred actions, that a court, after judgment, has no right to require the defendant to provide the plaintiff with the financial means with which to defend the judgment on appeal and to pay a monthly sum for the support of the children pending the determination of the appeal. To recognize such power in the trial court would be to assume that, with the rendition and entry of the judgment, the questions at issue had been definitively determined and settled, a position in direct contradiction to the rule that "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." (Code Civ. Proc., sec. 1049; *Naftzger v. Gregg*, 99 Cal. 83, [37 Am. St. Rep. 23, 33 Pac. 757]; *In re Blythe's Estate*, 99 Cal. 472, [34 Pac. 108]; *Story v. Story & I. Commercial Co.*, 100 Cal. 31, [34 Pac. 675]; *Borges v. Hillman*, 29 Cal. App. 144, 150, [154 Pac. 1075].)

Thus it is very clear that there is no inherent power or authority in a trial court to make, after judgment, such an order as the one here complained of, and, assuming without deciding, but questioning the constitutional right of the legislature to confer upon trial courts the power of making such an order as the one here after judgment in a case of this kind, we know of no statute investing such courts with such authority, unless, as counsel for the plaintiff contends, it is to be

found in sections 138, 139, and 140 of the Civil Code, the provisions of which are by section 196a expressly made applicable to a limited extent to actions based upon the last-mentioned section.

The sections named read:

"Sec. 138. In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same.

"Sec. 139. Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects.

"Sec. 140. The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case."

The only section of the above which appears to lend support to the contention of the plaintiff is 138. But when we examine the language of section 196a which refers to the above sections, it seems to us that the irresistible conclusion is that it was not thereby intended to create any additional *rights* in favor of the illegitimate child, but that the sole purpose was thus to provide a full and complete *remedy* for the *enforcement* of the rights previously given in said section. The language, it will be noted, is that "the court shall have power to *order and enforce* performance"—of what? The *obligations* which, in the preceding part of the section, are established in favor of the child as against its parents, and this to be attained, as far as a court is authorized to go in a case of this character and no further, in the *manner* and *mode* pointed out by sections 138, 139, and 140 as applicable to actions for divorce. Of course, we are not to be understood as saying that, if the present, or a like case, is affirmed on

appeal and thus it is definitively determined and settled that the "obligations" created by section 196a rest upon the parent proceeded against, the trial court, in such case, would not retain jurisdiction of the cause to the extent of requiring the parent, if deemed necessary, to give reasonable security for providing maintenance, etc., for the child and of modifying from time to time, if the circumstances appeared to call for it, the judgment in so far as is concerned the sum to be paid for the child's maintenance and support. This proposition we do not decide, however, it being unnecessary for the purposes of this decision to do so.

But, as declared, we are firmly of the opinion that, in making sections 138, 139, and 140 a part of section 196a, the intention of the legislature was not to create in behalf of the illegitimate child rights additional to those established for it by the latter section, but merely to provide a remedy for the enforcement of the rights so established or created.

Our conclusion is that the trial court was without jurisdiction to make the order from which this appeal is prosecuted, and it is accordingly reversed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 16, 1917.

[Civ. No. 2216. Second Appellate District.—February 17, 1917.]

JOSEPH M. SHULL, Respondent, v. W. H. CRAWFORD,
Appellant.

CANCELLATION OF MORTGAGE—PURCHASE PRICE OF AGENCY CONTRACT—FAILURE OF CONSIDERATION—RIGHT OF PURCHASER.—In an action to cancel a conveyance given as a mortgage to secure the payment of the purchase price of a contract giving the right of sale of sub-agencies for the sale of washing-machines, the defendant is not entitled to foreclose the mortgage and leave plaintiff to an action for damages, but the plaintiff, as a defense to the foreclosure, is entitled to show a failure of consideration for which the mortgage was given.

ID.—TOTAL FAILURE OF CONSIDERATION—NOTICE OF RESCISSION.—Where there is a total failure of consideration, it is not necessary to give notice of rescission before bringing suit to cancel the contract.

APPEAL from a judgment of the Superior Court of Riverside County, and from an order denying a new trial. W. H. Thomas, Judge.

The facts are stated in the opinion of the court.

Miguel Estudillo, for Appellant.

McFarland & Irving, for Respondent.

SHAW, J.—This action was brought to cancel and annul a certain conveyance of real estate made by plaintiff and his wife to defendant, which instrument, while in form a deed absolute, was in fact conceded to have been given as a mortgage to secure an alleged indebtedness due from plaintiff to defendant. The appeal is from a judgment in favor of the plaintiff and an order of court denying defendant's motion for a new trial.

It appears that a corporation known as the Domestic Utilities Manufacturing Company was engaged in the manufacture and sale of what was known on the market as the "Vacuum Clothes Washer." The company had adopted a lengthy, complex, and confused form of agency contract in appointing agents and making sales of its washers to those who could be induced to purchase the same in lots of 1,667, and whereby the purchaser was allotted the exclusive right to operate in territory selected and agreed upon. The form and substance of this contract was, if not intended as a means for the perpetration of fraud, well calculated to deceive the unwary and appeal to the gullible, for the reason that, while the purchaser was required to pay five thousand dollars for which he received 1,667 washing-machines, it gave him the right, provided he could find persons equally unsophisticated, to sell like contracts for five thousand dollars, for each of which he was to retain as his commission \$3,333, the balance of \$1,667 going to the company for the 1,667 washing-machines which it furnished to the purchaser of the contract, who likewise was given the right, upon like inducement, to search for "prospects" and, if found, develop them if pos-

sible. The evidence, however, shows that to render one a successful agent in selling the vacuum washing-machines, and particularly in selling the contracts, from which latter the profits were to be derived, required that the agent or purchaser be "posted, informed, and educated"; so the contract provided that an agent making a sale of "family rights," or to persons to whom he might sell "said articles at wholesale," or those "appointed as subagents," should "post, inform, and educate" them. Whether or not defendant was the holder of one of these valuable contracts is immaterial; at all events, it appears that he was authorized to sell the same, and selected Riverside as a fertile field for operation, and where it seems his labor was rewarded by the discovery of plaintiff, who was recognized as a "likely prospect." Defendant, it seems, was what is known as a "live wire" in the business, and without much effort convinced plaintiff that he, too, upon being "posted, informed, and educated," could with like success find unsophisticated individuals whom he could induce to buy the privilege of making like sales in this endless chain scheme.

On September 22, 1911, defendant consummated the sale of a contract to plaintiff, under which the latter was appointed the duly authorized agent of the company in the territory embracing the city of San Diego, and received the 1,667 vacuum clothes-washers, with the power to sell like contracts of agency, for which washers he paid defendant, as the agent of the company, the sum of \$1,667, and at the same time executed to defendant the mortgage as security to him for the payment of his commission of \$3,333, which plaintiff knew he was to receive. In his complaint plaintiff alleges, and the evidence shows, that, in consideration of his purchase of said contract, the defendant orally promised and agreed that he would "post, inform, and educate" plaintiff with reference to said clothes-washer, so that he would fully understand how to operate and demonstrate the same to the best possible advantage, and enable him to secure the appointment of other agents and subagents; and further agreed "that upon said plaintiff's selecting the territory in which he desired to have the exclusive right to sell said washers, that said defendant, Crawford, would accompany said plaintiff to said territory, and would put on lectures for a period of two months, said lectures to be delivered daily during said

period with the exception of Sundays." That plaintiff selected the city of San Diego as territory, where he opened offices for the transaction of said business, and demanded that defendant put on lectures for the purpose of demonstrating and assisting him in the sale of said washers, but that defendant at all times refused to comply with said demand and deliver said lectures, or to post, inform, and educate plaintiff in the use of the same or demonstration thereof. "That the said agreement on the part of the said defendant Crawford to put on said lectures as hereinbefore alleged, and to educate, post, and inform said Shull in the use of said washers and in the methods to be pursued in securing other agents and subagents for the said company was the sole and only consideration which induced the said plaintiff Shull to enter into said agreement with said defendant Crawford, or to accept an appointment as agent of said corporation, or to execute said contract as agent with said corporation, or give said note for \$3,333 secured as hereinabove alleged. That said plaintiff Shull has, by reason of the failure of said defendant Crawford to put on said lectures and instruct and inform and post him in the use of said washers, been unable to sell said washers or to interest the public therein or to secure other agents or subagents for said company." That had plaintiff known that said Crawford would not fulfill his said agreement plaintiff would not have purchased said contract and would not have given the mortgage to secure to defendant the payment from him of said sum of \$3,333; all of which allegations the court, in effect, found to be true. It is also alleged that said deed so given as a mortgage, if left outstanding, would constitute a cloud upon plaintiff's title to the real property therein described. The theory of the complaint and that upon which the action was tried was that the mortgage was given to defendant, which in fact it was, and not to the Utilities Company, which received from plaintiff all that was due to it; that the consideration for the mortgage so made to defendant was his agreement to perform certain services, without which promise plaintiff would not have bought the contract so made by the Utilities Company, sale of which was made to him by defendant; that defendant refused to perform the services constituting the consideration for the sale so made by defendant to plaintiff, and upon the ground of a failure of consideration moving to plaintiff

from defendant, there remains nothing upon which to found plaintiff's promise to pay to defendant the \$3,333 for which the mortgage was given; and likewise for a failure of consideration defendant is not entitled to a foreclosure of the mortgage, which he sought by a cross-complaint. Plaintiff was not seeking to rescind the written contract made with the Utilities Company under and by virtue of which he obtained the 1,667 washing-machines, but sought to rescind the oral agreement made with defendant whereby he was induced to enter into the written contract, for failure to perform the services in consideration of which plaintiff purchased the contract, and to have the mortgage constituting a cloud upon his real estate set aside and annulled. Section 1689 of the Civil Code provides that a party to a contract may rescind the same if the consideration therefor becomes entirely void from any cause. The consideration for the purchase of the contract was defendant's promise of sixty days' services in posting and educating plaintiff in the operation and demonstration of said machines and assisting him in the making of sales of five thousand dollar agency contracts at a profit of \$3,333, as well as washing-machines, which promise defendant refused to perform. Nevertheless, appellant contends that he is entitled to foreclose the said mortgage and leave plaintiff to an action for damages. To our minds, such a course, under the circumstances of this case, would be highly inequitable. In support of this contention counsel for appellant cites the cases of *Lawrence v. Gayetty*, 78 Cal. 126, 132, [12 Am. St. Rep. 290, 20 Pac. 382], and *Schott v. Schott*, 168 Cal. 342, [143 Pac. 595], in which the plaintiffs sought to have deeds which had been made and delivered upon the promise of the grantees to support the plaintiffs during their lives set aside. Such relief was denied upon the ground that the transaction constituted a fully executed contract. Such, however, is not the case here. It is an unexecuted contract like that involved in *Howlin v. Castro*, 136 Cal. 605, [69 Pac. 299]. Plaintiff has not parted with his property, but has merely given a mortgage thereon to secure his promise to pay defendant \$3,333, which the defendant by a cross-complaint is seeking to enforce. To our minds, plaintiff, as a defense to the foreclosure action, is entitled to show a failure of the consideration for which the mortgage was given; and if this be true, it must follow that he has the right to maintain an

action to remove the cloud from the title to his property. There was a total failure of consideration for plaintiff's promise to defendant, and hence it was not necessary to give notice of rescission before bringing suit to cancel the mortgage. (*Glass v. Glass*, 4 Cal. App. 604, [88 Pac. 734]; *Richter v. Union Land etc. Co.*, 129 Cal. 367, [62 Pac. 39].) In our opinion, not only did the complaint state a cause of action, but the findings to the effect that the allegations of the complaint were true support the judgment, and they in turn are supported by the evidence. The action is not based upon fraud, either constructive or actual, of the Utilities Company, nor that of defendant, but solely upon the ground that since defendant failed to perform the promise in consideration of which the mortgage was given, it would be inequitable to enforce it.

Numerous complaints are made as to rulings of the court in admitting evidence. These alleged errors are based upon appellant's contention that the action was one to rescind the contract between plaintiff and the Utilities Company, instead of which the rulings were based upon the theory of the court that the subject of the litigation was the oral contract made between plaintiff and defendant, which plaintiff sought to have annulled for want of consideration. Considered upon this theory, we find no prejudicial error in the rulings of the court. Nor was defendant prejudiced by reason of the court permitting plaintiff to file an amended complaint after notice. Even should we concede such error, it could not be said that it resulted in a miscarriage of justice. (Const., sec. 4½, art. VI.)

In our opinion the judgment and order appealed from should be affirmed, and it is so ordered.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 16, 1917.

[Civ. No. 1886. First Appellate District.—February 19, 1917.]

**M. E. MARVIN, Respondent, v. ENG-SKELL COMPANY
(a Corporation), Appellant.**

DEPOSITION—FAILURE TO ATTACH SEAL OF COURT—AMENDMENT AND ADMISSION IN EVIDENCE.—A deposition of a witness taken out of the state upon a commission which did not have attached to it the seal of the court as required by section 2024 of the Code of Civil Procedure is subject to amendment by affixing the seal thereto, and properly read in evidence, upon a showing that the witness was no longer at the place where the deposition was taken, but somewhere in a foreign country, and that to have the deposition again taken would cause an indefinite delay of the action.

ID.—AMENDMENT OF PROCESS—DUTY OF COURT.—A court has control over its process, and it should permit an amendment to the same in the interests of justice, and especially where the complaining party can show no resulting injury.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge.

The facts are stated in the opinion of the court.

Wm. J. Hayes, for Appellant.

Louis H. Brownstone, for Respondent.

THE COURT.—This is an appeal by the defendant from a judgment in favor of plaintiff for \$494.80, with interest and costs.

The action was brought for the recovery of damages for the breach of a written contract, under the terms of which the defendant agreed to sell and deliver to the plaintiff four reels of block tin pipe, each reel weighing five hundred pounds, at a price of fifty cents per pound, and which contract the defendant refused to carry out.

It appears that the day after the contract was entered into the defendant learned that the market price of block tin pipe had gone up from forty-five cents to sixty-eight cents per pound, which increase in price was due, according to the testimony of the defendant's manager, to the European conflict then and now prevailing. This witness also testified

that the defendant company was a small dealer in this article of merchandise; that it knew nothing of its sudden rise in price but that the plaintiff did; that when the plaintiff asked the price of such pipe and stated the quantity he required he was advised by the defendant to place the order directly with the Selby Smelting and Lead Company—which was at that time the only wholesale dealer in the commodity in California—and that plaintiff concealed his true reason for not purchasing from that company (which was that he would have to pay sixty-eight cents a pound therefor), and, with the purpose of misleading and deceiving the defendant, represented to defendant that he was not on friendly terms with the Selby Company and did not care to have any personal dealing with it.

Assuming that the evidence introduced by the defendant tended to sustain the allegations of the answer, that the contract was conceived in fraud and is therefore void, still we cannot reverse the judgment, were we ever so inclined, for the simple reason that there is an abundance of evidence in the record sustaining the findings of the court that no misrepresentation was made by the plaintiff to the defendant, and that there was no concealment or fraud practiced by the plaintiff upon the defendant. Furthermore, we are at a loss to see how the court could have made any other finding. The record discloses that on the fifth day of August, 1914, the plaintiff called at the place of business of the defendant and asked for a price on block tin pipe, stating also the quantity he desired. The clerk of the defendant was unable at that time to quote a price, and the plaintiff was requested to call again. He did so that afternoon and again on the next day, when the defendant quoted the price above stated and the agreement in writing was made. The plaintiff denied emphatically that he made any of the misrepresentations referred to. It also appears in the record that block tin was quoted in San Francisco at forty-five cents per pound the day the agreement was made. We conclude, therefore, that this first contention of the appellant is without merit.

Equally so is the point that the defendant in purchasing the block tin from the Selby Company to fill plaintiff's order was acting as the agent of the plaintiff. It is sufficient to

say in this behalf that the evidence does not sustain this contention.

A more serious question is whether or not the court committed error in admitting in evidence the deposition of M. E. Marvin. When the commission to take the deposition was issued it did not have attached to it, as required by section 2024 of the Code of Civil Procedure, the seal of the court; and at the trial the defendant for the first time objected to the deposition, and made a motion to suppress it. The motion not being opposed, it was granted, but later, learning that the witness was not in New York, where he was when the deposition was taken, but was somewhere in South America, and it appearing that to again have his deposition taken would cause an indefinite delay, the plaintiff made a motion to set aside the order suppressing the deposition, and to amend the process of the court by affixing its seal thereto. This motion was granted, and the deposition read in evidence. The granting of this motion is now contended to be error.

We are of the opinion that under the facts the court correctly granted the motion. The court has control over its process, and it should permit an amendment to the same in the interest of justice, especially when, as in this case, the party complaining can show no resulting injury. The authorities sustain this view. In the case of *The Oriental v. Barclay*, 16 Tex. Civ. App. 193, [41 S. W. 117, 122], the court, referring to that part of a motion to quash a commission based upon the ground that it did not bear the seal of the court, said: "The commission having been issued by the clerk of the court trying the case, and the deposition of the witness having been taken under such commission, the failure to place the seal upon the commission was a mere irregularity, which could not have worked an imposition; and it was not error to allow the clerk to place the seal upon the commission and to refuse to quash the deposition upon this ground." (See, also, *Austin v. Lamar F. Ins. Co.*, 108 Mass. 338; *Goodyear v. Vosburgh*, 41 How. Pr. (N. Y.) 421; *Lunksie v. Kerr* (Tex. Civ. App.), 34 S. W. 765; *Irvin v. Bevil*, 80 Tex. 332, [16 S. W. 21]; *Wallace v. Byers*, 14 Tex. Civ. App. 574, [38 S. W. 228]; *Wood v. Fleetwood*, 19 Mo. 529; 1 *Freeman on Executions*, 3d ed., sec. 70.)

The judgment is affirmed.

A petition for a rehearing of this cause was denied by the district court of appeal on March 21, 1917, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 19, 1917.

[Crim. No. 517. Second Appellate District.—February 20, 1917.]

**In the Matter of the Application of THOMAS HINES for
Writ of Habeas Corpus.**

**MUNICIPAL ORDINANCE—DELIVERIES FOR LAUNDRIES SITUATED OUTSIDE
OR CITY LIMITS—LICENSE—DISCRIMINATORY REGULATION.**—A city ordinance requiring the payment of \$12 per annum from every person, firm, or corporation conducting, managing, or carrying on a laundry, and the payment of \$120 per annum by every person, firm, or corporation owning, operating, or maintaining a wagon or other vehicle for the delivery of laundry work to and from any laundry situated outside of the city limits, is discriminatory and void as an attempt to create and enforce a discrimination not based upon differences in the nature of the business being transacted, or differences in the manner of conducting the same business, or any other difference other than the mere fact of difference in destination of the goods collected and delivered by wagons collecting for laundries located outside of the city and the destination of goods collected for delivery to laundries within the city.

APPLICATION for a Writ of Habeas Corpus originally made to the District Court of Appeal for the Second Appellate District.

The facts are stated in the opinion of the court.

Hutton, Jensen & Fogel, and Chester L. Coffin, for Petitioner.

Fredericks & Hanna, for Respondent.

CONREY, P. J.—The petitioner is held in custody by the city marshal of the city of Venice, a city of the sixth class. His imprisonment is pursuant to a judgment of conviction of the offense of operating and maintaining a laundry wagon for

the soliciting and delivery of laundry work in the city of Venice without having first procured a license therefor as provided by an ordinance of that city; it being charged that the petitioner was operating and maintaining said wagon for the delivery of laundry work to and from a laundry situated outside of the limits of the city of Venice. He was sentenced to pay a fine, with the alternative of one day's imprisonment for each dollar of such fine being unpaid, and he refused to pay the fine; thereupon he was committed to the custody of the marshal to be imprisoned until, at the rate aforesaid, the fine shall be paid.

Ordinance No. 510 of the city of Venice is an ordinance providing for licensing and regulating the carrying on of certain described businesses. Subdivision 34 of section 10 of that ordinance, as amended by Ordinance No. 636, establishes the rate of licenses for certain businesses and occupations; and so far as applicable to this case, the provisions thereof requiring the payment of license are as follows: "For every person, firm or corporation conducting, managing or carrying on a laundry, \$12.00 per annum. For every person, firm or corporation owning, operating or maintaining a wagon or other vehicle for the delivery of laundry work, to and from any laundry situated outside of the limits of the city of Venice, whether such wagon or other vehicle shall be used to collect laundry direct from the customers or from other wagons operated by the same, or some other person, firm, or corporation, for each such wagon or vehicle, \$120.00 per annum. For every person, firm or corporation running, operating, or maintaining an agency for the collection or delivery of laundry work on behalf of any laundry situated outside of the limits of the city of Venice, \$120.00 for each such agency so operated or maintained." Another section of the ordinance declares it to be unlawful to carry on any of the described kinds of business within the corporate limits of the city of Venice without first having procured a license from said city to do so, and provides that violations of the ordinance shall constitute misdemeanors punishable by fine or imprisonment, or both fine and imprisonment.

Petitioner claims that the ordinances above mentioned are void and that the recorder's court was without jurisdiction to try him upon the alleged offense; that the ordinance requires and imposes no tax upon wagons maintained for delivery of

laundry work to and from laundries situated in said city of Venice, and imposes a tax of only \$12 per annum on laundries located within said city; that there is nothing in the nature of vehicles delivering laundry to and from laundries outside of the city limits of Venice to require any further regulation than is required of laundry wagons operated to and from laundries inside of said city, or to require or justify a discrimination in the amount of license collected therefrom; that the charge of \$120 per annum is discriminatory against him and other owners and operators of vehicles for the delivery of laundry outside of the city of Venice, and in direct violation of the fourteenth amendment to the constitution of the United States, in that it denies to petitioner and other such persons the equal protection of the law and abridges their privileges and immunities; and especially, he claims, that such ordinances are in violation of sections 13 and 21 of article I of the constitution of the state of California. Said section 21 is as follows: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

We are of the opinion that the provisions of the ordinances under which petitioner has been convicted attempt to create and enforce a discrimination not based upon differences in the nature of the business being transacted or differences in the manner of conducting the same business, or any other difference other than the mere fact of difference in destination of the goods collected and delivered by wagons collecting for laundries located outside of the city and the destination of goods collected for delivery to laundries within the city. The license provisions in question are plainly devised as a protective tariff for the benefit of laundries located in the city of Venice or laundry wagons doing business with laundries located in the city of Venice, and apparently they have no other purpose. The case is similar in principle to that of *Ex parte Frank*, 52 Cal. 606, [28 Am. Rep. 642]. The ordinance under consideration in that case provided that any person who, in San Francisco, should sell property of sundry kinds defined by the ordinance without at the time having the goods in San Francisco or a bill of lading or receipt of a common carrier showing on its face that the goods named therein had been shipped and

were then *in transitu* to San Francisco, should pay licenses in certain stated amounts. The same ordinance provided another set of license fees, much less in amount, payable by persons selling the same kinds of merchandise within the city and having their goods actually within the city or *in transitu* under bill of lading. It was held that the ordinance was inoperative and void; that it was flagrantly unjust, oppressive, unequal, and partial; that it discriminated between merchants in the same place dealing in the same kind of merchandise for no better reason than that one dealt in goods either actually in the corporate limits or *in transitu* under a bill of lading, while the other dealt in goods outside of the corporate limits and not *in transitu* under a bill of lading. The same observations apply to the present instance, and it is our opinion that the provisions of the Venice ordinances to which we have referred are likewise inoperative and void.

The petitioner is discharged from custody.

James, J., and Shaw, J., concurred.

[Civ. No. 1842. First Appellate District.—February 20, 1917.]

FRED W. LAKE, Respondent, *v.* STERLING DEVELOPMENT COMPANY (a Corporation), et al., Appellants.

SCHOOL LANDS—PURCHASE UNDER ACT OF 1868—FORFEITURE—DECISION UPON AUTHORITY.—In this action, wherein the plaintiff sought and secured a judgment quieting his title to certain lands claimed to be owned by him under a certificate of purchase of state school lands issued to his assignor in the year 1869, it is held that the judgment and order denying a new trial must be reversed upon the authority of *Aikins v. Kingsbury*, 170 Cal. 674, which involved identical issues.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. J. M. Seawell, Judge.

The facts are similar to those stated in the opinion of the court in the case of *Aikins v. Kingsbury*, 170 Cal. 674.

Jesse Olney, for Appellants.

B. M. Aikins, R. P. Henshall, and Luther Elkins, for Respondent.

LENNON, P. J.—In this action the plaintiff sought and secured a judgment quieting his title to certain lands claimed to be owned by him under a certificate of purchase of state school lands issued to his assignor in the year 1869. The court denied a motion of the defendant Sterling Development Company for a new trial, and this appeal is from the judgment and order.

The primary points presented in support of the appeal are covered and controlled, we think, by the recent decision of our supreme court in the *mandamus* proceeding of *Aikins v. Kingsbury*, 170 Cal. 674, [151 Pac. 145]. In that proceeding it appears that the plaintiff in this action had granted a portion of the identical lands here involved to the petitioner therein, who sought by writ of mandate to compel the register of the land office of the state to issue a patent thereon. The essential features of the appeal in that case and in this are the same. The certificate there held to be forfeited is the identical certificate that the plaintiff herein claims under, and the issues raised in this case are identical with those raised in that. It is urged, however, by the appellants that the question of the annulment by foreclosure of the certificate under which respondent claims, and which question is referred to in *Aikins v. Kingsbury, supra*, but not there decided, be disposed of by us. A decision as to the validity or invalidity of that judgment was not deemed necessary in *Aikins v. Kingsbury*, nor do we deem it necessary here. It will suffice, we think, for us to say that the judgment and order appealed from should be reversed upon the authority of *Aikins v. Kingsbury*, and it is so ordered.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 19, 1917.

83 Cal. App.—4

[Civ. No. 2206. Second Appellate District.—February 20, 1917.]

S. N. CLARK, Respondent, *v.* BERLIN REALTY COMPANY (a Corporation), Appellant.

STOCKHOLDER'S LIABILITY — MONEYS LOANED — PLEADING — JOINDER OF CLAIMS.—In an action to recover of a stockholder of a corporation his proportionate liability for moneys loaned to the corporation at various times while he was a stockholder, the plaintiff may, in a single action, join the claims on the various loans.

ID. — COMPLAINT — INCORPORATION BY REFERENCE.—In an action to recover of a stockholder of a corporation his proportionate liability, where there are several counts, allegations showing the liability on one count may, by reference, be incorporated in subsequent counts.

ID.—PROMISSORY NOTE—TAKING OF NEW NOTE—PAYMENT.—The taking of a promissory note from a debtor, or of a third party, will not extinguish the debt and create a new obligation, unless received by the creditor under an express agreement that it shall have that effect.

ID.—INSUFFICIENT EVIDENCE OF EXTINGUISHMENT OF NOTES.—The taking of a new promissory note of a corporation by a bank for the amount of several loans of money made by the bank to the corporation, and the surrender to the corporation of the various notes previously given as evidence of the loan, is not conclusive evidence that it was the intention to thereby extinguish the note, so that a person who had ceased to be a stockholder of the corporation before the new note was taken was thereby freed from liability.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court

Valentine & Newby, for Appellant.

Benjamin E. Page, and Arthur C. Hurt, for Respondent.

JAMES, J.—Judgment in this action was for the plaintiff. The appeal is taken from the judgment and from an order denying the motion made by the defendant for a new trial. Plaintiff, as assignee of the Merchants' National Bank of Los Angeles, brought this action for recovery against the defendant on account of an indebtedness created by the Berlin Dye

Works & Laundry Company, a corporation, of which latter corporation defendant was at certain times material herein a stockholder and the owner of 209,535 shares of stock. The total capital of the Berlin Dye Works & Laundry Company was represented by three hundred thousand shares, all of which had been issued. Recovery was sought against the defendant for its proportionate liability as a stockholder. Plaintiff in his amended complaint, upon which issue was joined and trial had, alleged first in detail the fact of the corporate existence of the Berlin Realty Company and the Berlin Dye Works & Laundry Company. He then set out in the first cause of action that the Merchants' National Bank, on April 1, 1911, loaned to the Berlin Dye Works & Laundry Company (which for convenience we will hereinafter refer to as "the Laundry Company") the sum of eight thousand dollars and the making of a promissory note payable ninety days after date by the Laundry Company to cover the amount of that loan with interest, with a condition as to the payment of attorney's fees. It is then alleged that on the fourteenth day of April of the same year the same bank loaned to the Laundry Company the sum of one thousand five hundred dollars, taking a promissory note in like form, payable one day after date; that on the eighth day of May the same bank loaned to the Laundry Company the sum of two thousand dollars, taking a one-day note in like form as was used in the preceding transactions; that on the twelfth day of June of the same year the same bank loaned to the Laundry Company the further sum of one thousand dollars and took the Laundry Company's one-day note covering that amount; that on the thirtieth day of June, 1911, a new note for eight thousand dollars, and in renewal of the note dated the first day of April of that year, was given, and it was alleged that the sole purpose of the making of this note was to renew the eight thousand dollar note formerly given. It was further alleged that on the twenty-ninth day of November, 1912, the same bank loaned to the Laundry Company a further sum of two thousand dollars and took a one-day note covering the amount involved in this last transaction. It was then alleged that on the fifth day of March, 1913, a note was made by the Laundry Company in favor of the bank and duly delivered for the principal sum of fourteen thousand five hundred dollars, payable one day after date. This note it was

alleged was given, in its aggregate amount, to cover each of the notes hereinbefore described, and it was alleged that the five notes theretofore given were surrendered to the Laundry Company, and that the "said note dated March 5, 1913, for fourteen thousand five hundred dollars, was accepted and retained in place and renewal thereof by said bank, and not otherwise." There was also an allegation that the principal amount of the indebtedness so incurred at the several times had not been paid. It was next alleged that at the time the eight thousand dollars indebtedness was incurred the Berlin Realty Company was the owner of 209,535 shares of the three hundred thousand shares constituting the total and issued capital stock of the Laundry Company. In the second cause of action plaintiff, by reference therein stated, incorporated all of the material allegations set forth in the first alleged cause of action, and then alleged that at the time the indebtedness of one thousand five hundred dollars was incurred by the Laundry Company on April 14, 1911, defendant herein was the owner of the number of shares of stock described. The third cause of action was in like form, but referred to the indebtedness of May 8, 1911; and the fourth cause of action was set forth in like manner and form, but referred to the one thousand dollars indebtedness of June 12, 1911. No recovery was sought on account of the two thousand dollar note dated November 29, 1912, for the reason that the defendant at that time had ceased to be a stockholder of the Laundry Company. Defendant demurred to the complaint, setting forth various special grounds therefor, in addition to the general one that sufficient facts were not stated to constitute a cause of action. The demurrer was overruled and an answer filed.

It is contended, first, that the court erred in overruling the demurrer. The complaint in its allegations of fact was simple and quite clear. In it was first set forth the alleged facts of the transactions had by the Laundry Company with the bank, and these allegations were specific and particular as to the amounts of money borrowed, the dates, etc. There seems to be no ground upon which to base the contention, as suggested in one of the asserted grounds of demurrer, that the complaint was uncertain. There was no misjoinder of causes of action. The first alleged cause of action, to be sure, contained statements of the several transactions had with the bank the individual ones of which might no doubt have been set out

separately; but we cannot see how, assuming that such a procedure had been followed, defendant could have been any better informed of the facts upon which the plaintiff relied to sustain his suit. The contention that the allegations of the first cause of action being substantial ones and essential to the pleading could not by reference be incorporated in the subsequent alleged causes of action, is not supported by the California cases. The case cited on behalf of appellant to this point, to wit, *Haskell v. Haskell*, 54 Cal. 262, is not sustained by the later decisions in *Treweek v. Howard*, 105 Cal. 434, [39 Pac. 20], and *Green v. Clifford*, 94 Cal. 49, [29 Pac. 331].

The main contention, however, and that which forms the substance of the defense interposed by the defendant, is that all of the indebtedness incurred by the Laundry Company to the bank and as evidenced by the several promissory notes was extinguished when the note for \$14,500 was given on March 5, 1913, which was after the defendant had ceased to be one of the stockholders in the Laundry Company. It appeared in evidence that at the time the note for fourteen thousand five hundred dollars was made, the notes previously taken were delivered to the Laundry Company and marked "paid." The defendant urged and now insists that under the facts shown by the evidence, when the last note was made a novation was effected and under the agreement of the parties the new obligation extinguished the old debt. It has been held numerous times and by the decisions of this state that the taking of a promissory note from a debtor, or of a third party, will not extinguish the debt and create a new obligation, unless received by the creditor under an express agreement that it shall have that effect. It is further asserted in the authorities that there is not a presumption in favor of a note being received as payment under such circumstances; and where a note was given to take up another note, it was said that because the original note was surrendered and marked paid on its face, "was not conclusive evidence of the extinguishment of the debt." In the case of *Bonestell v. Bowie*, 128 Cal. 511, [61 Pac. 78], the text of the decision supports these statements, and a number of cases are therein collected and cited which are all to the same general point and effect. (See, also, *Gnarini v. Swiss American Bank etc.*, 162 Cal. 181, [121 Pac. 726].) In *London & S. F. Bank v. Parrott*, 125 Cal. 472, [73 Am. St. Rep. 64, 58 Pac. 164], the court said: "In the absence of an agreement to that effect, or evidence that such

was the intention of the parties, the taking of a note for an existing liability does not constitute a payment of the debt." In the same case it is further observed that "the plaintiff's claim against the appellants as stockholders is not upon the note, but upon the liability originally created by reason of the advances made to the corporation." And such was the action of the plaintiff here. There was, to be sure, some testimony heard by the trial judge which, taken by itself, may be said to tend to show an intention on the part of the bank to consider the last note as creating a new and distinct obligation—one which would cancel the old indebtedness. But the court had other testimony to consider which indicated that no extinction of the original indebtedness was intended to be worked by the taking of the last note, and such being the condition of the evidence, it is sufficient to say that an appellate court has no right to make any further review of the testimony, for, in view of the conflict, the decision of the trial judge in that matter is final.

We think there was no prejudicial error in refusing to allow a question to be answered which was asked of the cashier of the bank relative to his knowledge as to a change in the management of the Laundry Company being made prior to November 29, 1912. As is properly said by respondent, the president of the bank gave testimony which furnished an admission as against the bank, if it may be so termed, fully as favorable as that which the expected answer of the cashier could have supplied. The objection that the court erred in refusing to allow the case to be reopened after the parties had rested, in order to permit defendant to introduce further testimony, is addressed to a matter which is regulated by the sound discretion of trial judges, in the exercise of which appellate courts will not interfere. There is nothing shown from which we may conclude in this case that the court abused its discretion.

No other points are presented which call for discussion or consideration.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 19, 1917.

[Civ. No. 2073. First Appellate District.—February 21, 1917.]

E. H. MERRILL, Petitioner, v. **SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO et al.**, Respondents.

DEPOSITIONS—SUBPOENA—ATTENDANCE BEFORE COMMISSIONER—JURISDICTION.—Under the provisions of subdivision 3 of section 1986 of the Code of Civil Procedure, a subpoena issued by the clerk of the superior court upon the order of the court or a judge thereof, requiring the attendance of a witness before a commissioner or other officer for the purpose of giving his deposition, has the same territorial force and effect as a subpoena issued by the clerk requiring the attendance before the court, and such subpoena may require the attendance of a witness even though he resides outside the county but within the fifty-mile limit.

ID.—DISOBEDIENCE OF SUBPOENA—CONTEMPT—HEARING AND NOTICE ESSENTIAL.—In view of the provisions of section 1991 of the Code of Civil Procedure, the superior court cannot punish a witness for contempt for failure to obey a subpoena commanding him to appear before an officer for the purpose of giving his deposition until a report has been made to the court of such disobedience and a hearing had, and an order made directing the witness to obey the subpoena.

APPLICATION for a Writ of Review originally made to the District Court of Appeal for the First Appellate District to annul a judgment adjudging the petitioner guilty of contempt of court for failure to obey a notary public's subpoena.

The facts are stated in the opinion of the court.

R. H. Countryman, for Petitioner.

Joseph K. Hutchinson, and Walter Slack, for Respondents.

KERRIGAN, J.—This is a petition for a writ of review. The facts are briefly as follows: On November 2, 1916, there was filed in respondent court the affidavit of Joseph K. Hutchinson, one of the attorneys for the plaintiff in the action of *California Trona Co. v. Harry E. Lee et al.*, pending in the superior court of the state of California in and for the county of San Bernardino, showing that summons had issued therein and had been duly served on all the defendants therein; that

petitioner E. H. Merrill (one of the defendants) was a necessary and material witness for plaintiff, and that said witness resided out of the county of San Bernardino and more than fifty miles distant from the place of trial of said action, and in the county of Alameda. Upon the filing of this affidavit an order was made directing subpoena to issue, and the clerk of respondent issued a subpoena as directed, requiring the attendance of petitioner before H. B. Denson, a notary public, on November 9, 1916, at his office in San Francisco. The subpoena was duly served on petitioner and a witness fee of \$2.50 paid him, on November 3, 1916. Petitioner failed to appear at the time specified in the subpoena, or at all. This fact was made to appear to respondent by the certificate of the notary and the affidavit of Joseph K. Hutchinson. From the latter it appeared that petitioner resided within fifty miles of the place where said deposition was noticed for taking. On November 16, 1916, respondent made an order directing the sheriff to attach the petitioner and have him in court on November 29, 1916, to show cause why he should not be punished for contempt for disobeying said subpoena. This order, together with copies of the notary's certificate, affidavit of Joseph K. Hutchinson, and other papers relating to the matter, were served on petitioner on November 16, 1916. On November 29, 1916, petitioner appeared in court with counsel, and after argument respondent made an order, on December 5, 1916, finding and adjudging petitioner guilty of contempt. Judgment on this order was duly entered and recorded on December 6, 1916, and petitioner by this proceeding seeks to have it reviewed and annulled.

But two of the points discussed by petitioner in his brief require detailed notice. It is unquestioned that under the provisions of the second paragraph of subdivision 3 of section 1986 of the Code of Civil Procedure, an order to take the deposition of a witness may be made by the superior court of a county other than that in which the action is pending. But the petitioner does question the power of that court to compel the attendance of a witness before an officer for the purpose of taking his deposition, when such witness resides outside of the county in which that court is situated, even though his place of residence be within fifty miles from the place where the deposition is noticed to be taken. In other words, the petitioner contends that since the action was pend-

ing in the superior court of San Bernardino, the superior court of the city and county of San Francisco had no jurisdiction to require the petitioner, a resident of the county of Alameda, to appear in San Francisco for the purpose of there giving his deposition.

When a subpoena is issued to require the attendance of a witness before the superior court, or at the trial of an issue therein, the subpoena is issued by the clerk of the court as a matter of course, upon the application of the party desiring it. If it is issued to require attendance before a commissioner or other officer for the taking of a deposition, it must be issued by the clerk of the superior court of the county wherein the attendance is required upon an order of such court or of a judge thereof. (Code Civ. Proc., sec. 1986.) We can see no good reason why a subpoena issued by the clerk, upon the order of the superior court or a judge thereof, requiring the attendance of a witness before a commissioner or other officer for the purpose of giving his deposition, has not the same territorial force and effect as a subpoena issued by the clerk requiring the attendance before the court, or at the trial of an issue therein; and accordingly we hold that such a subpoena may require the attendance of a witness for the purpose indicated, even though he resides outside of the county in which it is issued but within the fifty-mile limit.

The remaining objection involves the question of whether or not it was the duty of the superior court, after a hearing upon the report of the officer of the disobedience of the witness, to make an order requiring the petitioner to obey the subpoena before finding him guilty of contempt of court—the solution of which question depends upon the construction and application of provisions of section 1991 of the Code of Civil Procedure. That section reads:

“Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court issuing the subpoena. When the subpoena, in any such case, requires the attendance of the witness before an officer or commissioner out of court, it is the duty of such officer or commissioner to report any such disobedience or refusal to the court issuing the subpoena; and the witness must not be punished for any refusal to answer a question or to subscribe an affidavit or deposition, unless, after a hearing upon

notice, the court orders him to so answer or subscribe and then only for disobedience to such order. Any judge, justice, or other officer mentioned in subdivision 3 of section 1986, may report any such disobedience or refusal to the superior court of the county in which such attendance was required; and such court thereupon has power, upon notice, to order the witness to perform the omitted act, and any refusal or neglect to comply with such order may be punished as a contempt of such court."

It is the contention of the petitioner that before the superior court may punish a witness for contempt of court for failure to obey a subpoena commanding him to appear before an officer for the purpose of giving his deposition, there must be a report to the court of such disobedience, and after a hearing thereon a direction to the witness by the court to obey the subpoena.

Counsel for the respondent, on the other hand, contends that such is the method designated by section 1991, only when the witness refuses to answer a question or to subscribe an affidavit or deposition; but that where he refuses to be sworn or disobeys the subpoena, he is defying a direct and lawful order of the court, and that upon the establishment of either of these facts he may be punished as for a contempt of court by reason of such disobedience without the court making a further order that he perform the act in question.

A better reason may be conceived in the case of a refusal to answer a question or to subscribe an affidavit or deposition, for the requirement that the court, after a hearing upon the report of the officer concerning such refusal, should order the witness to perform the omitted act before punishing him for a contempt of court, than in the case of a failure to obey the subpoena. In the former case the question may be an improper one and the witness justified in declining to answer it; and until the contrary has been determined by the court, (the officer taking the deposition having no such authority), there has been no disobedience of a lawful command. But in the other case, the subpoena being lawfully issued, a refusal to obey it is a direct disobedience of the command of the court, and hence there would appear to be no logical necessity for the court to specially order the witness to appear before the officer as enjoined by the subpoena; nevertheless the law-making power in enacting the section above

quoted may have deemed it advisable to provide that before a witness should be punished for disobeying a subpoena commanding him to appear before an officer and give his deposition, there should be an investigation by the court as to the sufficiency of the original showing made *ex parte* for the order for the deposition, and of the good faith of the witness in refusing to obey the subpoena. However that may be, it seems to us that the language of the section makes no distinction between a refusal to answer questions or subscribe an affidavit or deposition and a refusal to obey a subpoena or to be sworn. In each instance the refusal must be reported to the court, and, following the language of the section, upon the report of the "disobedience or refusal" to the superior court, the court has power upon notice "to order the witness to perform the omitted act, and any refusal or neglect to comply with such order may be punished as a contempt of such court."

In the present case the record discloses that there was no order by the court to the petitioner upon notice "to perform the omitted act." The judgment of the respondent, therefore, finding him guilty of contempt of court in the premises was beyond its jurisdiction.

The judgment is annulled.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 19, 1917.

[Civ. No. 1621. Third Appellate District.—February 21, 1917.]

H. F. SUHR, Jr., Respondent, v. EVA METCALFE et al.,
Appellants.

ASSIGNMENT—FINAL PAYMENT UNDER BUILDING CONTRACT—RIGHTS OF ASSIGNEE.—An assignment of the final payment due under the terms of a building contract demands, independently of any statute, an inquiry on the part of the assignee as to the conditions of future payments, and the rights of the assignee are no greater thereunder than those of the contractor itself.

ID. — CONSTRUCTION OF CODE — ASSIGNMENT OF THING IN ACTION — DEFENSES.—Where the final payment provided by a building con-

tract is not due when an assignment thereof is made, the assignment is of a "thing in action" within the meaning of section 368 of the Code of Civil Procedure, providing that in case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff or other defense existing at the time of or before notice of the assignment.

I.D.—EXTRA WORK—PAYMENT BY NOTE—AGREEMENT TO DELIVER BUILDING CLEAR OF ALL CHARGES—ARCHITECTS' FEES—PAROL EVIDENCE. A written agreement whereby a building contractor in consideration of the execution and delivery of the owner's note acknowledged satisfaction in full for all extras due and agreed to deliver the building upon completion "clear of any charge of any character whatever, also including architect," is not subject to explanation by parol evidence, and the admission of such evidence for the purpose of showing that the intention was to relieve the owners of any lien for the possible charge of the architects for the extra work put upon the building, is erroneous.

IV.D.—NOTICE TO WITHHOLD—SUFFICIENCY OF NOTICE—ACCEPTANCE OF ORDER OF CONTRACTOR.—An order on the owner given by a contractor to a subcontractor and by the latter presented to the owner for acceptance is sufficient notice to the owner to entitle the owner to withhold the amount from the contractor, as provided by section 1184 of the Code of Civil Procedure.

J.—DELAY IN COMPLETION—EXTRA WORK—INSUFFICIENT EXCUSE.—Where a building contract provides that no additional time shall be allowed for completion unless demand therefor be made in writing, delay in performance because of an agreement for extra work is not a sufficient excuse, in the absence of a demand for additional time as provided by the contract.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Luther Elkins, and R. P. Henshall, for Appellants.

Louis H. Brownstone, and J. J. Lermen, for Respondent.

BURNETT, J.—The action was in claim and delivery for the recovery of certain first mortgage six per cent certificates of the face value of eleven thousand five hundred dollars. The original defendant was the Western Mortgage and Guaranty Company, a corporation. Upon affidavit of the president of said company that the Metcalfes claimed to be the

owners of said property and had made a demand for its possession, the court made an order directing the Guaranty Company to deliver said certificates to the clerk of the court and that Eva and George Metcalfe be substituted as parties defendant in the place of said company.

The answer of said defendants sets forth the considerations which we are called upon to determine. Therein by suitable averment it appears: 1. That on or about the second day of April, 1912, the defendants entered into a building contract with the Mutual Construction Company for the construction by the latter of a hotel upon the lot of defendants on Geary Street, between Mason and Taylor, in San Francisco, for the sum of \$141,350. It was agreed that ninety thousand dollars of that sum should be payable in certificates of the Western Mortgage and Guaranty Company, which were to be secured by a first lien upon said real property, and that twenty-two thousand five hundred dollars of the face value of said certificates should be retained by the defendants and not delivered to the contractor until thirty-five days after the completion of the building. 2. That Righetti & Headman, architects, were employed by the defendants to draw the plans and specifications for the building and to superintend its erection for the customary fee of five per cent of the contract price, and that it was agreed between the Mutual Construction Company and defendants that said company would pay said fee. 3. It was stipulated that the building should be completed within ten calendar months from and after March 1, 1912, and that if the same should not be so completed, the defendants should be entitled to damages from said Construction Company, not as a penalty but as liquidated damages, the sum of fifty dollars for each day the building remained uncompleted; and that on or about December 12, 1912, the contractor further agreed to deliver the said building free and clear of all charges and liens whatever, including any liens for architects' fees.

Then follows the specification of the particulars in which the contractor failed to keep its agreement: (a) It failed to pay the balance of the fee of the architects in the sum of \$4,567.50, and it is averred that said Righetti & Headman claimed and asserted and have in fact a valid and subsisting mechanic's lien against said real property for this sum; (b) On June 9, 1913, the Mutual Construction Company was indebted to the Citizens' Construction Company for work

and labor performed and materials furnished on said building as subcontractor, in the sum of \$2,124.80, and that said contractors gave an order on said defendants for said sum, which order was accepted on or about June 9, 1913, and that defendants are now indebted to said subcontractor in said sum. (c) The contractor failed to complete said building until four months after the time fixed in the contract, and that thereby defendants suffered a loss of rent and were damaged in the sum of eight thousand dollars. (d) At the time of the acceptance of the building it was uncompleted, and that for the purpose of securing its completion it was agreed that the defendants should retain the sum of five hundred dollars until the completion thereof.

It further appears that the eleven thousand five hundred dollars in face value of said certificates referred to in the complaint were part of the twenty-two thousand five hundred dollars final payment due thirty-five days after the completion of the building, and that the plaintiff at the time he acquired his alleged ownership of the certificates had full knowledge and notice of these rights, counterclaims, and offsets, and furthermore that, on or about August 2, 1913, and after a knowledge and notice of all these facts, the plaintiff agreed to the retention by the Western Mortgage and Guaranty Company, the original defendant, of all these certificates until the performance by the Mutual Construction Company of all its covenants and agreements, including the payment of the demands above set forth.

The general findings and the judgment were in favor of plaintiff. As to the special defenses the court found that the Mutual Construction Company did not agree to deliver the hotel building to the defendants Metcalfe free and clear of all liens and charges, including a lien for architects' fees; that said company had not failed to carry out its contract, with the exception that certain work on the ground floor of the building had been omitted pursuant to agreement, and, for this work, five hundred dollars of the twenty-two thousand five hundred dollars worth of certificates was ordered to be retained by the clerk until the building was finally completed. As to the claim of the Citizens' Construction Company it was found that at the time said order of June 9, 1913, was given there was nothing due to the Mutual Construction Company from the defendants Metcalfe, for the reason that said com-

pany had previously assigned and transferred to plaintiff all sums of money due to it from the defendants, and that at the time of the presentation of this order to defendants they had notice of this prior assignment, and as to the acceptance of said order it was found that the attorneys who had indorsed upon the order the acceptance had no authority to accept the same for the defendants.

It can hardly be disputed that the rights of plaintiff as assignee of the Mutual Construction Company are no other or greater than those of said company, the contractor, and that if the aforesaid defenses are sound and decisive as against said company, they may be urged with equal propriety and effectiveness against the claim of plaintiff. In other words, it seems plain that plaintiff by reason of the assignment is entitled to all the rights and is subject to all the liabilities of the Mutual Construction Company growing out of and based upon said building contract. Indeed, the assignment, as far as the present controversy is concerned, related to "a thing in action," since the last payment was not due when plaintiff succeeded to the rights of the contractor, and section 368 of the Code of Civil Procedure is in point: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity." Besides, it is clear from the record that plaintiff had notice, or, at least, was put upon inquiry as to the conditional liability of the contractor, and therefore he cannot shield himself from the obligations of the contract. Again, on August 2, 1913, plaintiff consented in writing that the Western Mortgage and Guaranty Company should hold twelve thousand five hundred dollars of the said final payment under the contract for the protection of the defendants against these claims, and he cannot now repudiate his agreement.

In dismissing this point it may be said, indeed, that if the final payment supposed to be reserved for the protection of the owner can be so readily disposed of regardless of his rights, a building contract affords no obstacle to the facile and convenient perpetration of fraud against the property holder. But the fact must be, independently of any statutory provision, that the assignment itself of such claim demands an

inquiry upon the part of the assignee to determine the conditions of future payments. To these alleged defenses, applicable to plaintiff as to the contractor, we therefore devote some attention.

It is admitted that on December 12, 1913, an agreement was entered into by the contractor and the defendants in the form of a letter as follows:

(Letter-head of Mutual Construction Company.)

"San Francisco, Cal. Dec. 12/12.

"Mr. George Metcalfe and Mrs. Eva Metcalfe, San Francisco.

"Dear Sir and Madam: In consideration of the execution and delivery to us this day of your note for the sum of fourteen thousand six hundred and eighty-six (14686) dollars, secured by a third mortgage on your property on Geary street we hereby acknowledge satisfaction in full for all extras due us upon the building constructed upon the lot on Geary street *and we further agree to deliver said building to you upon the completion thereof clear of any charge of any character whatever, also including architect. . . .*

"Yours Very Truly,

"(Corporate Seal) MUTUAL CONSTRUCTION CO.,
 "Per (Signed) S. L. HANSBROUGH, Secretary."

The question in dispute is as to the force and effect of the clause we have italicized. It is not claimed that by reason of fraud, accident, or mistake there was any failure to express the intention of either of the parties, but, upon the contention that said terms are ambiguous, parol evidence was admitted to show what was understood by the adopted form of expression. In that respect we feel entirely satisfied that error was committed. The language appears to us plain and unequivocal, and in this case if it is to be varied by parol, no reason can be advanced why the same practice should not be permitted in any instance where parties have reduced their agreements to writing. How in concise phraseology it could be more clearly declared that the building when complete should be free from such a burden as the lien in question we are at a loss to understand. It was to be *clear of any charge of any character whatever*. This comprehensive language would necessarily include a lien for the architects' fees, but the company was not satisfied to let it rest at that, but has shown conclusively by specific mention that it had particularly in view a burden that might be imposed by reason of the architects' charge. The

familiar sections of the code cited by respondent do not, in our opinion, lend any support to his contention. The language herein seems to be clear and explicit and not to involve an absurdity, and, therefore, within the purview of section 1638 of the Civil Code, said language should govern the interpretation of the agreement. Manifestly, the agreement to turn over the building free from any liens does not involve an absurdity or even anything unusual or extraordinary, and since the said conditions concur, the succeeding section of the code (1639) would limit and confine to the writing itself the inquiry as to the intention of the parties. Section 1647, permitting explanation of a contract by reference to the circumstances under which it is executed and the matter to which it relates, may be of aid in many instances where it is apparent something needs explanation, but it cannot be extended to the point of permitting parol testimony to vary the express terms of a written instrument. If we are right in this position, it would not be disputed that the error was prejudicial, for the reason that the parol evidence was offered and received for the purpose of showing that the intention was to relieve the building and the owners of any lien or burden for the possible charge of the architects for the extra work put upon the building, and the proof is that there was no charge whatever for said services.

While the said provision seems to us so certain as to preclude parol testimony to determine its meaning, there is force in the other consideration suggested by appellants that if there be any uncertainty in the language, it should be interpreted most strongly against the party who caused the uncertainty to exist, that is, the contractor, who fits the position both of promisor and the person who prepared the contract. (Civ. Code, sec. 1654.)

We agree with appellants in their contention as to the claim of the Citizens' Construction Company. There is no dispute that the order for their payment was given by the Mutual Construction Company. We think it equally plain that it was accepted by appellants. If so, there was, in effect, a new contract, a novation, the substitution of one creditor for another. By that order the Mutual Construction Company authorized appellants to pay to said Citizens' Company, out of said thirty-five day payment, the sum of \$2,124.80, and when the order was accepted the liability and obligation of both became

fixed. Neither could thereafter question it, and if the Mutual Construction Company were the plaintiff herein, there could be no doubt that defendants could set up said amount as an offset to the claim made to the said deferred payment. For reasons already stated, we think respondent as assignee is equally bound with the contractor and that said offset may be urged against him.

If we are right in the view that the assignee occupies the same position as would his assignor, then, of course, there is no force in the claim that it was necessary to have a notice to withhold given to the architect or owner as provided in section 1184 of the Code of Civil Procedure. But as to that, appellants point out sufficient facts to show a substantial compliance with the requirement of that provision. The written recognition by the Mutual Construction Company of its obligation to the Citizens' Construction Company as made and directed to the owners on June 9, 1913, should be held equivalent to the notice provided by said statute, and the record shows that at that time the said Citizens' Company had a right to file a lien for the amount of its claim. The statute itself provides that "No such notice shall be invalid by reason of any defect in form, provided, it is sufficient to inform the owner of the substantial matters herein provided for." As stated by appellants: "In the present case the Citizens' Construction Company notified the owner of its claim, for it presented the contractor's recognition of its validity and its amount, vouched for by the contractor and itself. It presented this claim to the owner and asked him to accept and pay it." This was probably even more than the statute requires. It was at least equivalent to the notice contemplated by the law.

It is contended that the court was justified in finding that this order was not accepted by Eva Metcalfe, the owner. There is no doubt, however, that Mr. Brandon, who was the attorney for Mrs. Metcalfe, accepted this order for her on June 9, 1913. He seems to have been representing her in all these matters, and although he had no express authority to sign the acceptance, it would not seem unreasonable to conclude that his authority was broad enough to cover such act. As to this, also, it may be suggested that respondent, standing in the shoes of the Mutual Construction Company, assumes rather a questionable attitude in denying the authority of the attorney who was recognized and treated by said company as

the qualified agent of appellants. If the owner were disputing the authority of the attorney, a very different situation would be presented. However, granting the want of authority, as claimed, it cannot be disputed that the unauthorized act of the attorney might be ratified by the principal, and in this case there can be no doubt that it was so ratified. Mrs. Metcalfe's testimony was: "I was advised of the execution of this paper, defendant's exhibit 'F,' by Mr. Brandon on or about June or July. I accepted it and thought it was all right." This was a sufficient ratification within the teaching of *Ralphs v. Hensler*, 97 Cal. 296, [32 Pac. 243], and *Porter v. Lassen County etc. Co.*, 127 Cal. 261, [59 Pac. 563].

Besides, as before indicated, this particular claim was covered by the letter of plaintiff of August 2, 1913, which was agreed to by Mrs. Metcalfe and the Mutual Construction Company. This appears clear enough from the testimony in the record, and we see no reason why the contract of these parties should not be enforced.

As to the damages claimed for the failure to complete the building within the time specified, we think the delay has not been entirely excused or justified and that said delay did operate to the detriment of defendants. It is claimed that the extra work consumed about ninety days and that this was covered by a contract between the Metcalfes and the Mutual executed on December 12, 1913, "just eighteen days before the defendants claim that the building should have been actually completed." The amount of the extra work was \$14,686 and a third mortgage was given in payment of this. Respondent says: "It would be strange indeed if the defendants in this case were to be permitted to order fourteen thousand dollars worth of extra work within eighteen days prior to the time that the contract was to be completed and expect the same to be finished without allowing additional time." But it appears that when this agreement was made the extra work had already been done, so the argument is not persuasive.

To determine whether the extra work would excuse delay, we must look to the statute and to the agreement of the parties. The particular law in point is section 1511 of the Civil Code, as follows:

"The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is

excused by the following causes, to the extent to which they operate:

"1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse;

"2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or,

"3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time."

The case does not seem to fall within any of these subdivisions. It is, however, covered by the contract of the parties. Extra work involves an act of the owners and a modification of the contract. In subdivision 3 thereof it provided that "The time during which the contractor is delayed in said work by the acts of the owners or by the acts of God, which the contractor could not reasonably have foreseen and provided for, or by stormy weather which prevents the work, or by any strikes by employees or labor organizations, shall be added to the aforesaid time for completion; but no such allowance shall be made unless a written demand for additional time with the amount thereof approximately stated and the reasons for such demand given, is presented to the owners by the contractor within twenty-four hours after the cause for such delay has accrued." Then section 9 specifically provides for "alterations, deviations in, additions to, or omissions from" the plans and specifications, and declares that "the same shall in no way affect or make void the contract," except that the additional cost was to be added to the contract price. The extras, therefore, fall within said subdivision 3, and in order to claim an extension of time it was incumbent upon the contractor to make demand, which was not done.

In *McGinley v. Hardy*, 18 Cal. 116, there was a modification of the contract, but the case is different from this in that there was no agreement that written demand should be made for extension of time, and the court very properly held that the new contract operated to extend the time for completion of the building.

We can see no reason why it was not competent for the parties to provide in their contract for an exclusive method by which the time could be extended as to this particular feature, nor do we see anything in the way of giving effect to such agreement.

The mistakes of the architect, we think, also fall under said subdivision 3. He was the agent of the owner and his mistakes were therefore those of the latter. We think also that the interference by rain falls within said subdivision.

It is at least doubtful whether the claim that a period of thirty days should be allowed because of the condition of Geary Street is tenable. The court found that the delay was by reason of the act of the municipal authorities. We are not pointed to any evidence in the record that sustains the finding. It does not seem to be included among the facts of which the court may take judicial knowledge. No doubt the municipal authorities were engaged at the time in constructing a railroad on said street, and the proof was easily available, but it should have been produced. Probably through inadvertence it was not offered. As to whether such action of the municipal authorities would excuse the delay, we think the correct test is declared in *Carlson v. Sheehan*, 157 Cal. 692, [109 Pac. 29], to the effect that it rests upon the consideration whether it rendered performance practically impossible, and in that connection it is said that mere difficulty or unusual or unexpected expense would not excuse the contractor. It is, in our opinion, a close question whether there is sufficient evidence to sustain the conclusion that the condition of said street rendered the performance of the contract "practically impossible," but as the evidence may be different upon another trial, we refrain from passing upon the point.

We think the judgment and order should be reversed, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 23, 1917, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 19, 1917.

[Civ. No. 2215. Second Appellate District.—February 23, 1917.]

FRANCES G. RODGERS, Respondent, v. PACIFIC COAST CASUALTY COMPANY (a Corporation), Appellant.

INSURANCE—INDEMNITY AGAINST DAMAGES FROM ACCIDENTAL INJURIES—ACTION UPON POLICY—CONTROL OF LITIGATION BY INSUREE—RECOGNITION OF LIABILITY.—Where an insurance company, acting under the terms of a policy indemnifying the insured against loss and expense arising for damages accidentally suffered by reason of the operation of elevators in an apartment house, takes charge of and assumes exclusive control of an action brought against the insured for damages for injuries from such an accident, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment not exceeding the amount stipulated in the policy.

Id.—JUDGMENT—PAYMENT BY NOTE.—Under the terms of an indemnity insurance policy which promises to indemnify for loss paid by the assured, the satisfaction of a judgment procured by the giving of a promissory note is to be deemed payment of the judgment debt.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Gray, Barker & Bowen, William A. Bowen, and Bowen & Bailie, for Appellant.

Lee Riddle, W. O. Morton, Harry A. Hollzer, and C. B. Morton, for Respondent.

JAMES, J.—In this action the judgment entered by the trial court was in favor of the plaintiff. Thereafter a motion for a new trial was made by the defendant and denied by the court. The appeal is taken from the judgment and also from the order.

Plaintiff, on the eighteenth day of April, 1910, suffered bodily injuries in an elevator which was being run in an apartment house in the city of Los Angeles. The owner of the apartment house business was Nevada Irwin. The latter at the time of the accident held a policy issued by the defendant herein indemnifying her against loss and expense arising

for damages accidentally suffered by reason of the operation of elevators in the apartment house. The maximum liability fixed by the policy was the sum of five thousand dollars where injury was suffered by one person only. This plaintiff, after suffering her injuries, commenced an action in the superior court to recover from Nevada Irwin damages on account thereof, which suit resulted in a final judgment (after appeal taken and decided) in her favor for the sum of \$2,539.93. Within sixty days after this judgment became final, Nevada Irwin gave to the plaintiff herein her promissory note for the full amount of and in satisfaction of the judgment. She then, upon the promissory note being surrendered to her and canceled, delivered to this plaintiff an assignment of her (the said Irwin's) claim against the defendant here on the policy of indemnity insurance. This action was then brought. The case was tried before a jury with the result already indicated.

The policy issued by the defendant to Nevada Irwin in terms insured said Irwin on the account mentioned "against loss and expense arising from claims upon the assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of this policy by any person by reason of the operation of the elevators described herein." There were a number of conditions stated in the policy: It was required, among other things, that notice should be given to the company immediately of any accident, and that if suit was brought on account thereof, the assured should forward to the company all process and papers served, and then that "the company, at its own expense, will settle or defend said suit whether groundless or not; the moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the company." It further provided that "no action shall lie against the company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue." The contentions of appellant for reversal herein rest upon two principal propositions which are advanced in the briefs: 1. That under

the terms of the policy no action would lie against appellant until the assured had actually paid the amount of the judgment rendered against her, or some part thereof, and that the execution of a promissory note to the injured party would not amount to payment within the meaning of the policy. 2. That under the facts shown in evidence, the making of the promissory note by Nevada Irwin in favor of this plaintiff appears not to have been done in good faith, and that the transaction was not *bona fide*. There seems to be no contention but that an assured has the right under such a policy as that here considered to make a valid assignment of a matured claim against the insurer. The policy contains no terms appropriate to forbid such assignment. It was alleged in the complaint herein, and there appeared to be no dispute as to the facts of the matter, that Nevada Irwin gave the requisite notices to the defendant company as to the accident having happened to this plaintiff, and that when suit was brought to recover damages she delivered to the legal counsel for this defendant all papers in connection with such suit; that this defendant by its counsel took charge of the litigation, managed and controlled it throughout, both in the trial court and upon appeal—in fact, contested the action to the court of last resort. It has been held in several well-considered cases that where an insurance company acting under the terms of policies practically identical with those made by the insurer in this case takes out of the hands of the assured direction and control of litigation, its liability to the assured becomes fixed and determined upon the entry of judgment; and it is also held that if precedent payment of the judgment is required of the assured, such payment may be made by promissory note. The decisions indicating a contrary view on the first proposition do not commend themselves to our judgment as presenting a reasonable and fair construction of the contract, when the objects and purposes sought to be accomplished are taken into view. We are in agreement with the expressions to be found in the opinion of the supreme court of Minnesota in *Patterson v. Adam et al.*, 119 Minn. 308, [48 L. R. A. (N. S.) 184, 138 N. W. 281]. The court there says: "The object and purpose of the contracting parties is not to be lost sight of in construing a contract, nor is the rule that in case of ambiguity it must be resolved against the one who prepared the instrument. The language in the

lengthy document before us was not the choice of the assured. Recognition needs be taken of the enormous growth of liability insurance of late years. The hazards of modern industries and the risks connected with some of the advantages of present day life call for this kind of insurance. Policies attempting to fill this demand should, if possible, be construed so as not to be a delusion to those who have bought them." The court proceeds with the statement that, even granting that the policy was so worded that it must be considered one of indemnity, under the facts the company placed itself in a position which resulted in liability; there having been no payment of the judgment in that case by the assured. This last conclusion was based upon the fact, as here, that the company exercised the right reserved to it to settle and carry on litigation, excluding the assured from any interference therewith. The court again says: "Neither public policy nor legal principles can be invoked against the validity of these provisions, if they mean no more than an undertaking to contest an asserted claim against the assured, for which it is liable when established; but if, under the pretense of an insurance obligation, the company carried on litigation in the name of one who has neither voice nor interest therein, and which does not affect the company itself, because the assured is unable or unwilling to pay if plaintiff is awarded judgment, it would seem the company becomes an officious intermeddler. . . . We therefore hold that in a policy such as this, where the company has come into the litigation and assumed exclusive control thereof under its contract, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment it so permits to be established, not exceeding the sum stipulated in the policy, and also that, as to the plaintiff (the plaintiff being the person who secured a judgment for damages because of injuries suffered), it should be considered that such judgment is a debt due the assured from the company, and not dependent on any contingency." It was determined by that decision that the judgment creditor of the assured could attach by garnishment the amount of the liability incurred by the insurance company as a debt then due to the assured. The following cases support the proposition that under the terms of a policy of indemnity insurance which promise to indemnify for loss paid by the assured, the satisfaction of a judgment procured by

the giving of a promissory note is to be deemed payment of the judgment debt: *Kennedy v. Fidelity & Casualty Co. of New York*, 100 Minn. 1, [117 Am. St. Rep. 658, 10 Ann. Cas. 673, 9 L. R. A. (N. S.) 478, 110 N. W. 97]; *Taxicab Motor Co. v. Pacific Coast Casualty Co.*, 73 Wash. 631, [132 Pac. 393]. In the latter cases it is pertinently suggested as being inconsistent with the general purposes and intent of such policies to hold that unless the assured has the actual money or specific property to apply in discharge of the judgment, and that such money or property is so applied, no liability ever arises against the insurer. It has been often held, too often to require citation of authorities, that where there is an express agreement to that intent, a promissory note given to the creditor will extinguish the debt to which it is to be applied.

The second proposition advanced by the appellant, we think, is one which was finally decided by the jury, because it rests upon the evidence heard in the case and the circumstances surrounding the matter to be adverted to. It appeared that after the plaintiff here had found that Nevada Irwin had not sufficient property out of which she might at the time obtain satisfaction of the judgment, she, through her attorney, conferred with the attorney for Nevada Irwin. That it was then agreed that a promissory note should be made by Nevada Irwin in payment of the judgment, and (perhaps simultaneously) it was also understood that the promissory note after being so given should be surrendered and paid by the assignment of Nevada Irwin's claim to this plaintiff. Upon the giving of the promissory note satisfaction of the judgment was actually entered. Under the evidence the jury was altogether authorized to find that it was the intent that liability under the judgment should be extinguished by the giving of the promissory note of Irwin to this plaintiff. As we have suggested, however, this branch of the case enters the realm of fact, and it may not be said that there was no evidence sufficient to sustain the finding made by the jury as is implied from the verdict. And it may be further said that under the law as announced in the decision we first cited herein, when the judgment against Irwin became final the liability of the insurer became fixed. Assuming the correctness of this conclusion, it would then have been competent for Nevada Irwin, without the giving of a promissory note, to have assigned her claim against the insurer to

Rodgers in consideration of the satisfaction of the judgment. The transaction as it was made, however, was perfectly legal in the form it took, and we think, conceding the good faith of the transaction, as we must, was wholly within the rights of the parties.

The complaint made of error because of the giving of certain instructions and refusal to give other instructions offered has been examined. The court, in the view we take of the case, properly submitted to the jury the question as to whether the transaction wherein the note and assignment were given and made was one carried out in good faith and with the intent to extinguish the liability of Irwin upon the judgment. The instructions as a whole appear to have sufficiently and correctly stated such propositions of law as the jury needed advice upon.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 23, 1917, and the following opinion then rendered thereon:

THE COURT.—In its petition for rehearing the defendant insists that the opinion of the district court of appeal holds that, under the terms of the policy of insurance to Nevada Irwin, the company became bound to pay to Irwin the amount of the judgment recovered against her by the injured party as soon as it became final, and without previous payment thereof by Irwin to the injured party, and that the decision is based on that proposition.

The opinion is not based solely on that proposition. It also proceeds upon the theory that the payment by Irwin of the judgment against her in favor of the injured party is a condition precedent to the existence of a cause of action in favor of Irwin against the company, as indeed the policy expressly declares; but that such previous payment need not be made in money, but may be made in property of any kind, including the promissory note of Irwin if such note is accepted expressly as payment; a theory in which we concur.

This leaves as the main point of the case the question whether or not the note was accepted as payment and was made in good faith. This, as the district court says, is primarily a question of fact which the jury, on the evidence, resolved against the company.

The petition for rehearing is denied.

[Civ. No. 1955. First Appellate District.—February 24, 1917.]

PLEASANT VALLEY HOTEL CO. (a Corporation),
Respondent, v. E. A. HENDERSON, Appellant.

STATUTE OF LIMITATIONS—MONEY BORROWED BY DIRECTORS FROM CORPORATION — REPAYMENT UPON ACCOMPLISHMENT OF PURPOSES OF LOAN.—Where money belonging to a corporation is borrowed by two of its directors for certain purposes upon an agreement to repay the same when the purposes should be accomplished, and the corporation ratifies the transaction, the statute of limitations does not commence to run against the corporation's right to recover the money from the time the money was obtained, but from the time that the purposes were accomplished.

APPEAL from a judgment of the Superior Court of Fresno County. George E. Church, Judge.

The facts are stated in the opinion of the court.

Everts & Ewing, for Appellant.

C. K. Bonestell, for Respondent.

KERRIGAN, J.—This is an appeal by defendant from an adverse judgment. The question for determination in this case is as to whether or not, of the several causes of action alleged in the complaint, the demand therein set forth for one thousand dollars was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure.

The record shows that the action was commenced on November 19, 1914; that on January 6, 1912, defendant and one George F. Patterson, who were directors of the Pleasant Valley Investment Company, plaintiff's assignor, borrowed

from that company two thousand dollars for certain purposes, and agreed to repay the same when those purposes should be accomplished; that those purposes were accomplished so far as they could be in April, 1913, at which time, in compliance with their agreement, each was charged on the books of the company with one thousand dollars, and that at that time each agreed to pay to the Investment Company such sum; that George F. Patterson paid the money so borrowed by him, but that the defendant has failed and neglected to repay the amount so charged against him.

Assuming that the circumstances under which the two thousand dollars were obtained from the Pleasant Valley Investment Company stamped the transaction as a conversion of the funds of that company, still the company could waive the conversion, and repudiating the action of defendant and Patterson, could perhaps have brought an action immediately for money had and received. However that may be, it appears from the record that the Pleasant Valley Investment Company elected to ratify in detail the transaction as negotiated by those directors; it chose to adopt their acts as its own, to regard them as valid and to enforce the performance of the obligations arising therefrom. Therefore, the statute of limitations did not commence to run against the plaintiff's cause of action on January 6, 1912, the time the money was obtained by defendant and Patterson, but from the time the obligation to repay was fixed, to wit, in April, 1913. The action, therefore, having been filed in November, 1914, was brought before it was barred by the statute.

Judgment affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 23, 1917.

[Civ. No. 2219. Second Appellate District.—February 24, 1917.]

B. L. CHAMBERS et al., Respondents, v. BELMORE LAND & WATER COMPANY (a Corporation), Appellant.

LEASE—ACTION FOR BREACH—PROXIMATE CAUSE OF DAMAGE.—In this action to recover damages for the breach of the terms of a contract of lease, it is held that the proximate cause of the damage sustained by the plaintiff was the failure of the defendant to construct headgates, as provided by the lease, to enable the plaintiff to irrigate the land demised.

ID.—PREVENTION OF DAMAGE—RULE INAPPLICABLE.—Where the failure to construct such headgates caused a failure of a large portion of the lessees' crop, they cannot be denied recovery on the ground that they should have constructed the headgates themselves, where the cost of such construction would have been upward of two thousand dollars.

ID.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—A new trial will not be granted on the ground of newly discovered evidence which was almost wholly cumulative, and particularly where it appeared that by the exercise of reasonable diligence the unsuccessful party could have procured such evidence at the trial.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Barstow, Beach & Rohe, for Appellant.

Drew Pruitt, and H. G. Redwine, for Respondents.

SHAW, J.—The subject of this action is defendant's alleged liability for damages due to its breach of the terms of a contract of lease made to plaintiffs. Upon trial judgment was entered in favor of plaintiffs, from which, and an order denying its motion for a new trial, defendant appeals.

The evidence tended to establish the following facts: Defendant was the owner of a large tract of land in Fresno County, which it leased for the growing of grain thereon, to plaintiffs, who agreed to pay defendant as rental therefor one-fifth of the crop grown thereon during the season of 1912. The land was located in an arid zone, by reason of which fact

it was necessary in the growing of crops thereon to irrigate the same. The source of supply of water for such irrigation was two streams known as Silver Creek and Panoche Creek, having their sources in the mountains, and which as a rule during the rain and flood seasons afforded a supply of water, which, however, varied from year to year, depending upon the precipitation of moisture upon the watershed tributary to said creeks. In order to utilize the waters of the creeks for irrigating the land, it was necessary to construct a dam across the streams whereby to divert the water therefrom into a main canal, by means whereof and lateral ditches connected with said main canal it was distributed over the land. The lease contained provisions as follows: "It is agreed by party of the first part (defendant), that he shall construct a dam across the Silver Creek and Panoche Creek on or before December 20th, 1911, and to place headgates at different points of turn-outs. It is agreed by party of the second part (plaintiffs), that he shall use all water from Silver Creek and Panoche Creek diligently, which means, as long as water can be had in heads of one hundred inches or more, and that it shall be turned either upon the land farmed by said second party, or upon other land owned by party of the first part. It is further agreed on part of party of the second part (plaintiffs), that he shall keep said dam and gates in repairs and that he will attend said dam in person or by reliable party during heavy rains." Plaintiffs entered upon the land and in the winter of 1911 and 1912 plowed and prepared about eight hundred acres thereof for grain, which they seeded to barley, and also reconstructed and cleaned the lateral ditches extending throughout the tract for use in irrigating the grain. Defendant constructed the dam across said streams, completing the same some time in February and prior to there being sufficient rainfall to affect the flow of water in the creeks, but at all times neglected and refused to construct the headgates which it agreed to install in the main canal for the purpose of diverting water therefrom into the lateral ditches, the cost of which would have been about two thousand dollars. It appears there was little rainfall upon the watershed tributary to said creeks during the winter, but that about March 1st there was a storm as a result of which the creeks were filled with water for a period of about fifty hours, during which time plaintiffs, as best they could without the headgates, and

with a sufficient force of men and by means of dirt dams constructed in the main canal, irrigated about one hundred acres of the barley which they had planted. It further appears that had defendant complied with its agreement to put in the headgates in the main canal as promised, the flow of waters in said creek during said fifty hours could have been used to properly irrigate at least four hundred acres of said barley, and that for want of the headgates it was impossible for plaintiffs to control the water and conduct it upon the land, as a result of which at least three-fourths of the water which might have been used for irrigation with the headgates installed was lost and dissipated. The conclusion of the court was that, notwithstanding the light seasonal rainfall, the flow of water in said creeks, had headgates been put in as agreed upon, would have enabled plaintiffs to irrigate four hundred acres of the barley instead of one hundred, and that the one hundred acres produced fifteen sacks of 110 pounds each per acre, which, after paying the rent reserved in said lease, gave plaintiffs twelve sacks of barley per acre; and that said three hundred acres additional, had they been irrigated, would have produced a like number of sacks per acre, the market value of which, after paying all expenses connected therewith, would have been \$5,078.55.

While admitting its breach of the contract to install the headgates, appellant insists that such breach of the contract was not the proximate cause of the damage found to have been sustained by plaintiffs. Says appellant: "The record shows there were many steps between the headgates and the actual securing of a crop of barley." It appears, however, that plaintiffs, relying upon defendant's promise, took every step required of them in the plowing, seeding, use of the water available for irrigation, and growing of a crop upon the land, and that owing to the fact that the flow of water in said streams during the season of 1912 continued for only fifty hours, it was impossible by the use of dirt dams to irrigate more than one hundred acres of land, whereas with the headgates installed, which would have permitted control of the flow of water, four hundred acres could have been irrigated during said time. Nor is there any ground for claiming that the lack of irrigation of the crop was due to plaintiffs' failure to care for the irrigating system, since there is ample evidence to the contrary. The situation is explained by the testimony

of one of plaintiffs' witnesses who, in referring to extra work done, stated: "If we had had the headgates and the turnouts we would not need to have done this extra work. We made some of the dams before the water started and some afterward; we had one in when the water first came, and we had to go up the ditch and turn it out into No. 6, and we had to turn it also to get it in No. 7. We had to go to the dam (a distance of four miles) and turn the water out of the main canal, go back down, put this mud dam in, and go up to the canal again and turn the water in there again and let it come down. A large part of the time during that fifty hours the water ran we had to turn it down the creek in order to put in the mud dams." In our opinion, it is apparent from the evidence that, whatever might have been done in preceding years when for a long period of time the streams afforded a continuous flow of flood waters, the flow of water therein for a period of fifty hours only during the month of March, 1912, was insufficient to irrigate more than one hundred acres of the land without the headgates called for by the contract; and that had these gates been installed, the flow of water, as found by the court, was adequate to irrigate four hundred acres. Hence the proximate cause of failure of the crop on the three hundred acres of land was want of irrigation, due directly and solely to defendant's neglect to install headgates in the main canal by means of which the water diverted from the creeks could, with the force of men employed, have been controlled, and, through the lateral ditches constructed therefor by plaintiffs, properly distributed over the land.

Conceding the damage sustained to have been due to defendant's breach of the contract, appellant nevertheless insists that plaintiffs should themselves have constructed and installed the headgates; in support of which contention it cites the case of *Mabb v. Stewart*, 147 Cal. 413, [81 Pac. 1073], to the effect that in a case of this character, where the party injured could with *reasonable diligence* and *slight expense* have prevented the injury, the measure of damage sustained is limited to the reasonable cost of doing that which would have prevented the injury. To the same effect is 1 Sutherland on Damages, third edition, section 88, where it is said: "Where the damages that would otherwise result from a wrong of this sort can be reduced by reasonable diligence and at slight expense upon the part of the party injured, the measure of damages in case the

injured party willfully and negligently fails to use the diligence or incur the expense, is not the serious consequences which actually and naturally result from the deprivation, but is limited to the reasonable expense which would be necessary to prevent further loss." In the Mabb case plaintiffs could have prevented damage to the extent of nearly three thousand dollars by the payment of thirty dollars wrongfully exacted by the defendant therein as a condition of supplying water for irrigation. While applicable to the facts in that case, the rule has no application to the circumstances in the case at bar. Plaintiffs had the right to assume that defendant would, prior to the need therefor, construct the headgates in accordance with its agreement. Moreover, if there was a slight rainfall only, the headgates would have been useless and of no avail to plaintiffs. The cost was not slight, but, as shown by the evidence, the expense of installing the same would have been some two thousand dollars. The conditions existing and cost of the improvement render the rule to which we have referred inapplicable to the case.

One of the grounds for a new trial was newly discovered evidence, in support of which defendant filed several affidavits. An examination of these not only shows that the alleged newly discovered evidence was touching issues presented by the pleadings, but almost wholly cumulative. Moreover, it appears that defendant by the exercise of reasonable diligence could have obtained the testimony of such witnesses for use at the trial. The issues being tendered by the pleadings, it was the duty of defendant to make such preparation to meet the same as it deemed advisable; and the fact that it expected plaintiffs to produce said witnesses is no excuse for its failure to have produced them.

There is no merit in the contention that the court failed to find upon material issues; and the claim that there was a settlement between the parties which, as to plaintiffs' claim for damages, constituted an accord and satisfaction, is groundless.

The court in ascertaining and determining the damages sustained by plaintiffs followed the rule laid down in *Teller v. Bay and River Dredging Co.*, 151 Cal. 209, [12 Ann. Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942], which, conceding it to be in conflict with that of *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 314, [62 Pac. 562], cited by appellant, must

nevertheless, since it is later in point of time, be deemed the law upon the subject.

In our opinion, the appeal is without merit, and the judgment and order are therefore affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2199. Second Appellate District.—February 24, 1917.]

VERNE H. LINCOLN, Respondent, v. PACIFIC ELECTRIC RAILWAY COMPANY (a Corporation), Appellant.

APPEAL—FINDINGS—CONFLICT OF EVIDENCE.—The appellate court will not disturb a finding of fact by the trial court, or the implied finding of a jury that is supported by evidence, if the evidence is conflicting.

Id.—NEGLIGENCE—INJURY TO MOTORMAN OF INTERURBAN TRAIN—RUNNING INTO OPEN SWITCH—LACK OF CONTRIBUTORY NEGLIGENCE.—In this action by a motorman of an interurban electric train to recover damages for personal injuries sustained from the running of his train into an open switch causing collision with a local car, it is held that the evidence is sufficient to support the implied findings of the jury that the plaintiff was not negligent in driving his train into the switch in disregard of switch lamp signals, or in approaching the switch point with the train not under control and prepared to stop, as required by the defendant's rules.

Id.—COMPARATIVE NEGLIGENCE—EFFECT OF STATUTE.—Where at the time of the occurrence of such accident there was a statute in force providing that an employee's contributory negligence should not be a bar to recovery for personal injuries where his negligence was slight, and that of the employer was gross, in comparison, but the damages might be diminished in proportion to such contributory negligence (Stats. 1911, p. 796), the plaintiff, even if found to be negligent, is not precluded from recovery if the jury believed his negligence was slight in comparison with that of his employer; and where such an instruction is given, it will be presumed that the jury properly assessed damages, making due allowance in accordance with the facts found and as required by the statute.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Grant Jackson, Judge.

The facts are stated in the opinion of the court.

Frank Karr, R. C. Gortner, and A. W. Ashburn, Jr., for Appellant.

John S. Steely, and Jones & Evans, for Respondent.

CONREY, P. J.—This is an action wherein an employee of an interurban electric railway company seeks to recover damages for personal injuries alleged to have been sustained by the negligence of the employer. The defendant denied all allegations of negligence and as a separate defense alleged contributory negligence on the part of the plaintiff. The defendant has appealed from a judgment in favor of the plaintiff and from an order denying its motion for a new trial.

The accident occurred at Long Beach, California, on February 6, 1913, at about 6:10 P. M. Plaintiff was and had been for several years a motorman of the defendant, running trains upon its line between Los Angeles and Long Beach. American Avenue is a double avenue of the city of Long Beach, lying on the east and west sides respectively of a private right of way of the defendant company. On that right of way defendant has double tracks running north and south. At a point between Fifteenth and Fourteenth Streets a curved track leads from the south-bound main track of defendant, swinging gradually southwesterly into Fourteenth Street. In addition to its interurban cars, the defendant operated local cars, called the Willowville cars, and it was the custom to run Willowville cars into the curve above mentioned so as to allow the through trains south-bound to pass them on the main line. On the evening in question a Willowville car was running southward, followed by a three-car train of which plaintiff Lincoln was the motorman. The crew of the local car consisted of the motorman, Lysaght, and the conductor, Jesse Dunn.

At the point of divergence of the curved track from the south-bound main track and on the west side of the tracks, there was a switch-stand on which was established a switch which was operated by a lever for the purpose of opening and closing the switch, which when opened gave access from the main tracks to the curved track. The switch was operated by a hand lever, and a part of the apparatus consisted of devices for signaling. These devices consisted of colored

lights and also of flat sheets of metal called wings. When the switch was closed and locked and the main line in order, the white wings were perpendicular to the main track and the red wings were parallel to the main track, green lights alone showing. When the switch was open for a train to take the siding, the red wings were perpendicular to the main track and the white wings parallel thereto, red lights alone showing. In throwing the switch, the top part of the switch would move through an angle of ninety degrees. The rules and regulations of the transportation department of the defendant company then in force were well known to the above-named employees, Lincoln and Dunn. Subdivision B of article 142 of those rules was as follows: "After a regular train clears the main track and switches are properly set for the main track, the conductor must step to the side of the track opposite the switch-stand until after the opposing train has passed, keeping his hand-lantern at night in full view of the approaching train, but giving no proceed signal." Rule 112 was as follows: "Trainmen must not accept a proceed signal as against fixed signals, until they are fully informed of the situation and know they are protected. When fixed signals are in operation, trainmen must not give proceed signals against them."

On the occasion in question, in order to let a through train from Los Angeles pass a local car, the crew of the local car stopped at the switch between Fifteenth and Fourteenth Streets. It was the duty of Dunn, conductor of the local car, to operate the switch for the passing of these cars. Dunn stepped to the ground, holding in his hand a red and a white lantern; he gave to the motorman of the through train, Lincoln, a signal with his red lantern requiring Lincoln to stop or slow down until the local car should have been taken out of the way. Dunn then went forward on the ground to the switch to open it so that his local car might get off the main line. The lamp of the switch-stand then showed a green light northward and southward in conformity with a closed switch. Dunn opened the switch and the signals changed accordingly. The Willowville car proceeded and entered the switch, going ahead therein until its rear stood at the curb line between the railroad right of way and the westerly division of American Avenue, about 138 feet from the switch point. Conductor Dunn, his local car having entered the switch, should then

have thrown the handle of the switch westward again to close the switch, which would have caused the red light to disappear on the switch lamp and the green light to throw its rays northward toward the approaching through train. Both parties contend, and the evidence tends to show, that Dunn did not completely close the switch, but the parties do not agree upon the fact as to what Dunn actually did do. Appellant contends that Dunn left the switch entirely open in front of the through train and that he closed it to cover up his fault immediately after the through train had passed into the curved track and the accident had happened. Respondent contends that Dunn closed the switch in front of the through train at least so far as to change the red light to green, and that the through train got into the curve in spite thereof. At any rate, it is the fact that the train swung into the curve without cutting, bruising, or marking either of the switch points or any of the rails, and crashed into the rear end of the Willowville local car, whereby the plaintiff was injured.

Immediately behind the three-car train which had just entirely passed into the curved track, the switch was found set for the main track and with the green light showing properly northward and southward. Dunn, the conductor of the local car, denied that he had so set the switch after the collision. Two witnesses testified that they saw the light change its north and south rays from red to green immediately behind the train. Counsel in their briefs agree as to what were the respective theories upon which the case was tried. Respondent's theory is that Conductor Dunn left the switch partly open, so that the flange of the right-hand front wheel of the first car engaged with the west point of the switch, which extends northerly one and three-quarters inches farther than the east point of the switch, and threw the switch instantly fully open and thus allowed the train to swing into the curve without derailment. Appellant's theory is that Conductor Dunn left the switch entirely open and that respondent brought his train into the curve against a red light and into an open switch.

Appellant concedes, of course, the rule that this court will not disregard a finding of fact by the trial court, or the implied finding of a jury, that is supported by evidence tending to support such finding; and that if the evidence is conflicting, the finding based thereon will not be disturbed. But

appellant contends that the physical facts shown, and against which there is no evidence, compel the conclusion that the plaintiff was guilty of contributory negligence directly and proximately causing the accident. Under this general contention counsel for appellant urge four propositions. (1) That plaintiff was negligent in driving his train toward and into the switch, in disregard of the danger indicated by the lamp thereon, and the company's rules concerning same. (2) That plaintiff was negligent in approaching the switch point not under control, prepared to stop, as required by the rules of the company. (3) That if plaintiff approached said switch under full control, prepared to stop, then he negligently failed to stop within the distance intervening. (4) That the evidence is insufficient to establish any negligence against defendant, except in the failure of Dunn to close the switch, and plaintiff was equally negligent in that event.

(1) The evidence is sufficient to support the implied finding against defendant on the first proposition. The plaintiff did not run into an open switch, with a red signal displayed against him. But it is argued that the switch could not have been entirely closed, for then the train would have remained on the main line. Let this be admitted. Then it is said by appellant's counsel that it is inconceivable that the switch could have been sufficiently open to have allowed the train to enter it, without a corresponding misdirection of the rays of the lamp signal; that to run toward a signal imperfectly displayed is as much negligence as to run against a full red light. In this connection our attention is directed to rule 125 of the company: "A signal imperfectly displayed . . . must be regarded as a stop signal." In accordance with this rule the court instructed the jury that if they believed from the evidence that as the plaintiff approached the switch-stand, the lamp signal thereon was imperfectly displayed, such imperfectly displayed signal or absence of signal was then and there according to said rule, a stop signal, requiring plaintiff to stop his train before reaching the switch; and that a violation of that rule by the plaintiff would constitute negligence. To find a verdict for the plaintiff under this instruction, the jury must have believed from the evidence that the signal was not imperfectly displayed. Is the evidence of the physical facts so far beyond doubt that this finding could not be true? Appellant relies upon the evidence which shows the construc-

tion and mode of operation of the switch, and certain photographs which were taken on April 23, 1913, which show the appearance of the switch and its signals in three positions, to wit, when the switch is open, when the switch is closed, and when the switch is half open; and contends that from that evidence the flange of the front right-hand wheel, which would touch the switch first, could not have passed to the right of the point of the switch rail, unless there was an opening of at least one inch at the switch point, which obviously could not be done without affecting the position of the switch lamp and causing its lights to become imperfectly displayed. These facts are relied upon to overcome the testimony of the several witnesses who testified that as the train approached the switch the green light was fully displayed; the contention being that it was physically impossible for this testimony to be true. But there are facts which impair the conclusiveness of this argument. Conductor Dunn, in describing what he did after his Willowville car had gone beyond the switch, said: "Then I picked up the switch lever and swung it around and threw it down, and looked up at the light and it was green and I stepped across the track and gave the high-ball. I could not say whether I locked that switch when I threw it back or not, nor could I say whether I lowered the lever all the way down over the dog or not. After Mr. Lincoln answered me by two toots, his train came on down the line and took the switch without any warning." Lee Higgins was conductor of the front car of the three-car train. He had been conductor on the Willowville line some time before the time of this accident and had operated the switch referred to herein—it having then the same system of locks and keys as at the time of the accident. He testified "that the points of the switch do open—the one opening on the west and the other on the east closing, when the lever is begun to be moved, just begun to be moved, and yet the sign shows green." There thus appears to be some testimony, which the jury was entitled to believe, that the red light would not necessarily begin to show instantly at the beginning of the motion of the lever which was closing the switch; and that the accident may have been caused by failure of Dunn to effectually close and fasten down the switch toward which plaintiff's train was moving. It is therefore entirely conceivable that on account of the jarring of the train immediately before it reached the

switch, or from some other cause, the switch opened enough to throw the train over to the curved track and yet that the plaintiff would never have seen anything in the signal contradicting its first message to him indicating that the switch was safely closed.

(2) Rule 146 was as follows: "Trains must approach all . . . meeting and passing points, under full control, and prepared to stop." There is no exactly prescribed definition of the conditions amounting to full control, nor of the precise limitations of a preparation to stop. These elements would differ according to the machinery and weight and length of trains or cars, and according to local conditions of tracks and grades. Of course it means a control and a preparation appropriate to the probable emergencies, and has for its purpose the avoiding of accidents. The plaintiff testified that when the Willowville car stopped, to go over to the curved track, his train was running at the rate of one or two miles per hour, and was a thousand feet behind the local car. Then when the train advanced, he picked up speed. "I was going when I struck the switch, about twelve to fifteen miles an hour; fifteen miles would put it to the limit." At that time "I had no electricity on at all." "The Willowville car was then standing at the curb line, between the right of way and the street, with the back end of it at that point, which is 138½ feet in a straight line from the switch-stand. Going at twelve or fifteen miles an hour, it would be impossible to stop a three-car train in that distance." Plaintiff's testimony as to speed of his train on arriving at the switch was confirmed by numerous witnesses. Counsel for appellant call attention to the fact that six expert motormen testified that even at fifteen miles an hour, this train could have been stopped in fifty to seventy-five feet. There is no other evidence to the contrary, other than plaintiff's testimony showing how he used the stopping devices, and that nevertheless he failed to stop within the distance required to avoid the collision. The testimony of those motormen may favor appellant with respect to the next proposition which we are to discuss, but it really confirms the verdict as to the present question, for it entitled the jury to find that plaintiff had his train under full control, and prepared to stop, if they believed that his speed did not exceed fifteen miles per hour.

(3) Then why did the plaintiff not stop his train in time

to avoid the collision? His failure to do so is urged by appellant as establishing beyond doubt the contributory negligence of the plaintiff. In discussing this proposition we will assume that plaintiff had complied with the rule above stated, and that he came to the switch with his train under full control and prepared to stop. If this were not so, the plaintiff would have been negligent. For in view of the purpose of that rule it would be entirely beyond reason to hold that a properly managed train, if under full control and prepared to stop, would meet the emergency which this train faced, by running 138 feet into the rear of a loaded car, and going thirty-five feet farther after the collision, before the train stopped.

What, then, was the defect in management which caused this train to go on as far as it did go? The train was equipped with devices for reversing the current through the motors, and also was equipped with air-brakes. There is no claim that any of these were defective or insufficient. It follows, as the night the day, that something was wrong with the plaintiff's management of the machinery committed to his care. His testimony was that when he reached the switch he felt the car raise up and bump, like it had struck something, and immediately he realized that something was wrong, as his train went in on the siding. "The second I felt the jar or raising up, I reversed the current to check the train as quick as I could, and I held it there until I felt the train begin to go ahead again, and it felt like the breakers went out, and I then turned on the emergency brake. I figured that was the quickest way to check the train. . . . If it gets too heavy a charge—for instance, reversing the train—the breakers are put on there expressly to keep the motors from being burned up; and it felt like when I reversed it that it went out; and just the minute I felt the resets or breakers had begun to go, I put it in the emergency, as I thought that was the quickest way to stop the train. . . . I did all that was possible to stop the train and I did not stop it until the collision came. . . . I put on the air as soon as I felt the train give way to the breakers or it felt like the breakers were gone." All of the six motormen who said that a train of the kind in question and operating under the stated conditions could be stopped within eighty feet or less, specified that this would be done by using the air-brakes. A train moving at the rate of twelve miles per hour will travel 138

feet in about eight seconds. There is no statement in evidence showing how much time was consumed by the plaintiff in using the "reverse" before he applied the air-brakes. Assuming—since the testimony on the point is not contradicted—that the train must have stopped within eighty feet after the air-brakes were applied, and remembering that even when retarded by the collision the train did not stop until it had traveled 173 feet from the switch, it must be true that the plaintiff traveled ninety-three feet and used up five seconds of his precious time before he applied the air-brakes. But although defendant's witnesses declared that by full and instant use of the air-brakes the train could have been stopped within eighty feet, they admitted a high degree of efficiency in the method of stopping a train, in emergencies, by reversing the current, a process which also reverses the direction of motion of the car-wheels. It was admitted by one of these men, who had been employed as an instructor for the motormen, that the motormen were sometimes instructed to use the reverse, in emergencies, "under certain conditions," to stop trains. Also, "after applying the power and finding the power would not stop it, then applying the air under those conditions, he could do nothing else." Under the testimony, the jury may have believed that it was a mistake of judgment for the plaintiff to have tried the effect of the "reverse" before using the air-brakes, and yet that this error did not amount to negligence. And even if the jury found that the plaintiff was negligent, this fact did not necessarily require that the verdict be in favor of the defendant. At the time when this accident occurred there was in force a statute which changed in important respects the law relating to the liability of employers for injuries sustained by their employees while engaged in the line of duty of their employment. In section 1 of that act we find that in actions to recover damages for personal injuries thus sustained, "in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the

amount of negligence attributable to such employee." (Stats. 1911, p. 796.) The court instructed the jury in accordance with these provisions of the statute and it is not suggested that there was any error in the instructions given. It is entirely consistent with the verdict that, although the jury might have attached the taint of negligence to the conduct of the plaintiff, yet that under the evidence they believed that his negligence was slight and that the negligence of the defendant "was gross, in comparison." If so, it is to be presumed that in assessing damages the jury made due allowance in accordance with the facts found and as required by the statute.

(4) The fourth point is that, if the defendant was negligent by reason of the failure of Dunn to close the switch, then the plaintiff was equally negligent. For reasons which are made apparent by what we have said in discussing the other points considered, this court cannot say that the plaintiff was "equally negligent" with the defendant. The evidence was such that the jury's finding upon the facts must be accepted as final.

On cross-examination of the plaintiff, after the plaintiff had testified that as he approached the switch the light signal facing him was green, he said: "And then as I came along, going ten or fifteen miles an hour, my entire train entered that switch. I do not account for it at all." Defendant's attorney then asked: "There is no way to account for it, is there?" Plaintiff's attorney objected to this question as improper cross-examination and calling for a conclusion of the witness, and the objection was sustained. Appellant suggests that the witness had testified as to his long experience as a motorman; as to speed, stopping of trains, interpretation of signals, and so on; and contends that it was error to refuse permission to ask him how he could account for the fact that the train entered the switch. While the objection might very well have been overruled, we do not think that the defendant was seriously prejudiced by the contrary ruling. The further testimony elicited on the same cross-examination seems to have covered all of the matters which probably would have been developed by or followed upon an answer to the above quoted question. Several other alleged errors in rulings upon evidence are pointed out by appellant, but in their relation

to the record they seem even less important than the objection which we have discussed.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 26, 1917, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 23, 1917.

[Civ. No. 1615. Second Appellate District.—February 26, 1917.]

**SARAH JOHNSON, Respondent, v. NELS JOHNSON et al.,
Appellants.**

ACTION FOR MAINTENANCE—JOINDER OF GRANTEES OF COMMUNITY PROPERTY—UNAUTHORIZED JUDGMENT.—In an action for maintenance wherein the wife joined as parties defendant with her husband his father, mother, and brother, upon the theory that they had, by means of a fraudulent conspiracy with the husband, acquired certain real estate alleged to be community property of the spouses and thus deprived her of her interest therein, a judgment that the plaintiff do have and recover from such defendants a stated sum of money, found to be one-half of the proceeds of the property so acquired, is unwarranted, in the absence of any finding of fraud, and where the evidence shows without substantial contradiction that they paid full value for the property.

ID.—ATTORNEY'S FEES—UNAUTHORIZED JUDGMENT.—In such an action a judgment awarding the plaintiff attorney's fees against such defendants, as well as the husband, is likewise unwarranted.

ID.—AWARD OF COMMUNITY PROPERTY—LACK OF JURISDICTION.—In an action for maintenance without divorce, the court is without jurisdiction to award any community property to the wife, as the husband is entitled, until the marriage is dissolved, to the control of the community property with absolute power of disposition other than testamentary, except that he cannot make a gift thereof without her written consent.

ID.—PURPOSE OF ACTION.—The purpose of the suit for separate maintenance is to specifically enforce the general duty of the husband by directing certain definite payments to be made at regular intervals

for the wife's support, and, subject to such provisions, their relations to each other and to the community estate is precisely the same as though no such action had been brought or an award made.

APPEAL from a judgment of the Superior Court of Los Angeles County. Grant Jackson, Judge.

The facts are stated in the opinion of the court.

I. Henry Harris, Charles A. Bank, and W. Gerrard Abbott, for Appellants.

Harriman, Ryckman & Tuttle, for Respondent.

SHAW, J.—In this action plaintiff, without asking for a divorce, sought a decree awarding her permanent support and maintenance, as provided in section 137 of the Civil Code. Upon the theory that they had, by means of a fraudulent conspiracy with her husband, acquired certain real estate alleged to be community property of the couple and thus deprived her of her interest therein, she joined as defendants with him his father and mother, Frank and Beda Johnson, and his brother, Bayard Johnson. Plaintiff obtained a judgment, from which all of the defendants appeal upon a record presented in accordance with sections 953, 953a, and 953b of the Code of Civil Procedure.

By the decree it was adjudged that plaintiff Sarah Johnson do have and recover of and from defendants Beda Johnson, Frank Johnson, and Bayard Johnson, the sum of \$1,787.50, together with attorney's fees of \$150, which sum of \$1,787.50 the court adjudged to be one-half of the proceeds of the community property so conveyed by Nels Johnson. It was further adjudged that Nels Johnson pay to plaintiff the sum of \$20 per month as an allowance for the support and maintenance of Frances Johnson, the minor child of plaintiff and her husband. As stated, the theory of the complaint as to the defendants other than the husband was that they had by means of fraud acquired community property of plaintiff and her husband. Waiving any question as to the sufficiency of the allegations of fraud, as to which, however, we entertain grave doubt, there is no finding of fraud on the part of any of the defendants; nor is there any evidence whatsoever tending in the slightest degree to justify a finding that would war

rant a judgment such as that here rendered against defendants Frank, Beda and Bayard Johnson. For aught that appears in the findings to the contrary, they paid full value in consideration of the conveyance of the property so made by Nels Johnson to them, and the evidence without substantial contradiction shows the payment of such consideration. Briefly stated, the evidence shows that after his marriage, Nels Johnson obtained a contract for the purchase of a lot at the price of one thousand eight hundred dollars. In making the first payment he borrowed five hundred dollars from his father, which sum he paid thereon at the execution of the contract. Of the deferred payments \$750 was paid out of his earnings after marriage. Being unable to keep up the payments, and being largely indebted to his father, he, in payment of such indebtedness and \$150 cash at the time paid to him by his father, conveyed the property to his mother, who paid the balance of \$550 due upon the contract for the purchase thereof and took a deed to the property, which she afterward conveyed to her son, Bayard Johnson, for two thousand five hundred dollars, and he, under an arrangement with his father, conveyed it in exchange for an equity in other property which was subject to a mortgage of seven thousand five hundred dollars. The court found this equity to be of the value of \$4,125, which, after deducting the \$550 paid by Beda Johnson, left \$3,575, all of which the court declared to be community property of plaintiff and her husband. It thus appears that, at most, \$1,250 represented the community interest in the lot, and since it is conceded that Beda Johnson in acquiring the deed thereto paid \$550 of the purchase price, it would appear in any event that she was entitled to such proportionate share of the \$4,125 as her payment bore to the purchase price of the lot. In her complaint plaintiff alleged that the first payment of five hundred dollars made upon the contract of purchase was paid out of the separate funds of Nels Johnson. If her allegation be accepted as true, then only \$750 paid in the purchase of the lot constituted community funds.

Assuming the existence of fraud, we know of no authority, statutory or otherwise, under which the court was warranted in rendering the judgment against defendants other than Nels Johnson for the sum of \$150 attorney's fees.

Moreover, the decree did not affect the marital relation (*McKay on Community Property*, sec. 410; *Kusel v. Kusel*, 147 Cal. 57, [81 Pac. 295]), and until dissolved, the husband was entitled to the control of the community property with absolute power of disposition other than testamentary, provided that without the written consent of the wife he could not make a gift thereof or convey the same without a valuable consideration (Civ. Code, sec. 172), and we know of no principle of law under which a wife without obtaining a divorce can be awarded one-half of the community estate. The case of *Cummings v. Cummings*, 2 Cal. Unrep. 774, 14 Pac. 562, was an action for divorce wherein the plaintiff, alleging that the husband had conveyed community property with the intent on the part of both the grantor and grantee to defraud plaintiff of her rights therein, sought a decree annulling the same and awarding her a one-half interest therein. It was there held that an action to set aside a conveyance of community property made by a husband, on the ground of fraud, cannot be maintained by the wife while the marriage bond exists. In support thereof the court cited the case of *Greiner v. Greiner*, 58 Cal. 115, where it was likewise held (quoting from the syllabus): "A wife cannot maintain an action while the marriage bond exists, to set aside a transfer of the common property, made by the husband for the purpose of defrauding her." (See, also, *Van Maren v. Johnson*, 15 Cal. 312; *Kusel v. Kusel*, 147 Cal. 57, [81 Pac. 295]; *Tibbets v. Fore*, 70 Cal. 245, [11 Pac. 648]; *Valensin v. Valensin*, 28 Fed. 602.) The purpose of the suit for separate maintenance is to specifically enforce the general duty of the husband by directing certain definite payments to be made at regular intervals for the wife's support. Subject to such provision, their relations to each other and to the community estate is precisely the same as though no such action had been brought or an award made. The status of the parties may be restored by reconciliation, in which case the necessity for the separate maintenance would terminate. Notwithstanding this fact, however, or other conditions which might be mentioned, a judgment of this character would give to the wife one-half of the community property.

Another objection made to the judgment, which seems to be well founded, is that the court found that the Title Insurance & Trust Company should be appointed as trustee of one-half

of the amount of the community estate, to receive and disburse the same upon plaintiff's order, but in the conclusions of law, as well as in the judgment, the court gave said fund to plaintiff absolutely and without any limitation thereon. It is not awarded as maintenance, but the judgment awards it to plaintiff absolutely, to be dissipated, given away, lost in speculation, or used in any manner which her fancy or whims might dictate.

The answer of defendants alleged that in a former action brought by plaintiff against Nels Johnson for divorce, a trial of which was had, the matters alleged in this action had been adjudicated and determined by the court, wherein the divorce was denied, but an order was made under section 136 of the Civil Code allowing plaintiff \$25 per month for maintenance. The answer also alleged that defendant Frank Johnson had loaned to defendant Nels Johnson the sum of \$500 for the purpose and used by the latter in making the initial payment upon the contract for the purchase of said lot. The court made no finding as to either of these issues tendered. Clearly, defendants were entitled to findings upon both issues.

The judgment appealed from is reversed.

Conrey, P. J., and James J., concurred.

[Civ. No. 2095. First Appellate District.—February 26, 1917.]

RICHMOND DREDGING CO., Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

WORKMEN'S COMPENSATION ACT—AWARD FOUNDED UPON CONFLICTING EVIDENCE.—An award of the Industrial Accident Commission founded upon a fairly substantial conflict in the evidence will not be disturbed.

APPLICATION originally made to the District Court of Appeal for the First Appellate District for a Writ of Review to annul an award made by the Industrial Accident Commission.

The facts are stated in the opinion of the court.

38 Cal. App.—7

Redman & Alexander, for Petitioner.

Christopher M. Bradley, and C. Harold Caulfield, for Respondents.

THE COURT.—The petitioner, in support of its contention that the award made by the Industrial Accident Commission in this case should be annulled, argues that the evidence points all one way, viz., against the conclusion arrived at by the commission, and that there is no evidence in the record upon which its award can be based. We are of the opinion, however, that there is a conflict in the circumstantial evidence upon which this award is founded; and while we feel that the commission might with propriety have reached a conclusion diametrically opposed to the one arrived at by it, and probably would have found stronger reasons in support thereof in the circumstantial evidence relied upon by the petitioner, nevertheless having made its finding upon what we conceive to be a fairly substantial conflict in such evidence, we do not see how we can interfere with the award, and for that reason the writ is dismissed and the award affirmed.

[Civ. No. 2303. Second Appellate District.—February 27, 1917.]

ITA PIERCE, Respondent, v. EMPLOYERS' INDEMNITY EXCHANGE, Appellant; MRS. GRACE NICHOLS COOLEY, Respondent.

APPEAL—MISTAKE AS TO COURT—JURISDICTION—CONSTITUTIONAL LAW.
The saving clause of section 4 of article VI of the constitution, that no appeal taken either to the supreme court or district courts of appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto, does not give to the court to which the appeal has been wrongly taken any jurisdiction to make orders extending time, or any other orders, except the order of transfer.

ID.—DISMISSAL OF APPEAL—FAILURE TO FILE BRIEF IN TIME.—An appeal must be dismissed where the time for filing appellant's opening brief had expired when the notice of motion to dismiss the appeal was served and filed.

MOTION to dismiss appeals from the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Oliver O. Clark, George M. Pierson, and Claud B. Andrews, for Appellant.

Ingall W. Bull, and Fleming & Woodard, for Respondents.

THE COURT.—This was an action at law in which the amount of the demand was less than two thousand dollars, and the appeal should have been taken to this court. Nevertheless the defendant, Employers' Indemnity Exchange, appealed to the supreme court, and filed its transcript with the clerk of that court on the nineteenth day of December, 1916. By order of February 6, 1917, the supreme court transferred the case to this court, the transfer being made on jurisdictional grounds. No brief having been filed on behalf of the appellant, the respondent Pierce, on February 8, 1917, served and filed notice of motion to dismiss, stating, among other grounds of motion, that appellant had not filed its brief or points and authorities within thirty days from the time of filing the transcript. More than thirty days after the transcript was filed, and before the transfer of the case to this court, the chief justice of the supreme court signed an order extending appellant's time for filing points and authorities until the nineteenth day of February, 1917, and on the nineteenth day of February, 1917, the presiding justice of this court signed an order which was entered in the minutes, extending appellant's time for the same purpose for a further period of fifteen days. Without doubt the order obtained from the chief justice of the supreme court was inadvertently made by him without having his attention called to the fact that the appeal had been taken to the wrong court. Section 4 of article VI of the constitution, after defining the appellate jurisdiction of the supreme court and of the district courts of appeal, states that no appeal to either of those courts shall be dismissed for the reason only that the same was not taken to the proper court, "but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regu-

larly appealed thereto." It has never been held that this saving clause of the constitution gives to the court to which the appeal has been wrongly taken any jurisdiction to make orders extending time, or any other orders, in such a case, except the order of transfer. It is true that the supreme court may transfer any case from a district court of appeal to the supreme court, but until it has made such order of transfer, it is without jurisdiction over cases in which the constitution provides that the appeals shall be taken to a district court of appeal. The appellant cannot by its own mistake confer jurisdiction contrary to the constitution. The order made by the presiding justice of this court extending the time of appellant for filing its opening brief was made without knowledge that respondent had served and filed a notice of motion to dismiss the appeals, and would not have been made if that fact had been called to his attention. That order, therefore, is revoked. As the time for filing appellant's opening brief had expired on the eighth day of February, when the notice of motion to dismiss was served and filed, respondent is entitled to a dismissal as called for by her motion. The rule to this effect has been settled by several decisions, among which are: *Barnhart v. Conley*, 17 Cal. App. 230, [119 Pac. 200]; *McCabe v. Healey*, 139 Cal. 30, [72 Pac. 359]; *Coats v. Coats*, 146 Cal. 443, [80 Pac. 694].

Respondent's motion to dismiss the appeals is granted.

[Civ. No. 1905. First Appellate District.—February 27, 1917.]

JULES KLOSTER, Appellant, v. C. W. HAWN, Respondent.

LANDLORD AND TENANT—CROPPING LEASE—PAYMENT FOR LEVELING AND CHECKING LAND—INTERPRETATION OF ORAL CONTRACT—CONDUCT OF PARTIES.—Where parties standing in the relation of landlord and tenant with respect to a tract of land which the latter was to work on shares under a cropping lease place their own construction upon the terms of an oral understanding between them as to the extent to which the work of the tenant in leveling and checking the land should proceed before he was entitled to be paid for such work, it is not error for the trial court to interpret the contract in keeping with the conduct of the parties in making their settlements from time to time.

ID.—RECOVERY FOR LEVELING AND CHECKING LAND—EVIDENCE—TESTIMONY OF SURVEYOR—REBUTTAL.—Where an action in unlawful detainer to oust the tenant from the land is consolidated for trial with a subsequent action brought by the landlord for proceeds from the sale of crops, in which action the tenant by cross-complaint sought judgment for money expended in plowing and checking the land upon an oral agreement, it is not prejudicial error to refuse to permit the plaintiff to testify in rebuttal as to his having ordered a surveyor to make a survey of the land for the purpose of showing the amount of work done by the defendant, or in refusing to permit the surveyor to testify as to what work his survey showed to have been done, where the record shows that the surveyor, when called as a witness by plaintiff, testified, without objection, to the extent of identifying the maps which he had made, and such maps were then admitted in evidence.

APPEAL from a judgment of the Superior Court of Fresno County. George E. Church, Judge.

The facts are stated in the opinion of the court.

L. N. Barber, and F. W. Docker, for Appellant.

W. D. Crichton, and C. K. Bonestell, for Respondent.

LENNON, P. J.—This is an appeal by the plaintiff from a judgment in the defendant's favor for the sum of \$340 and costs upon his answer and cross-complaint.

The record discloses the following facts: During the years from 1913 to 1915, inclusive, the plaintiff and defendant stood in the relation of landlord and tenant with respect to a certain tract of land in Fresno County, which the defendant was to work on shares under a cropping lease. During the close of the latter year the plaintiff commenced an action in unlawful detainer for the ouster of the defendant from the land. The defendant apparently appeared and answered in that action, and issues being thus made up, the cause was ready for trial. In the meantime the plaintiff commenced the present action against the defendant for the recovery of money alleged to have been received by the latter for the plaintiff's use and benefit from the sale of certain crops raised upon the land. The defendant appeared in that action with an answer and cross-complaint for money expended in plowing and checking the land in question upon an oral agreement with

the defendant providing for the extent and compensation of such work. Plaintiff answered said cross-complaint, admitting the making of an oral agreement with the defendant for the leveling, checking, plowing, and seeding of certain portions of the land in question, but denying that its terms were those alleged by the defendant, and averring that the defendant had not performed or completed the performance of his part of said agreement. The issues in this action having been thus made up, both of said causes came on for trial, whereupon it was stipulated by counsel for the respective parties that the two causes should be tried together. The court permitted this to be done, and upon such dual trial the plaintiff apparently took the laboring oar, and undertook to testify upon his examination with respect to the amount of leveling and checking of the land which the defendant had done during the years in question, and also as to the various transactions between the defendant and himself relating to said agreement and its performance, and also as to the settlements made from time to time as the products of the land were sold and their proceeds divided. The defendant also testified as to the terms of the oral agreement between the parties, with respect to the leveling, checking, and cultivation of the land, and the application from time to time of the moneys realized from the disposition of its crops. The court found from the evidence before it that there was a balance due the defendant of \$340, and rendered its judgment accordingly. Plaintiff appeals.

Appellant's first contention is that the evidence is insufficient to sustain the findings of the court in the particular respect that it fails to show that the defendant had so far completed the work of leveling and checking the land in question, according to the terms of the oral agreement between the parties, as to be entitled to recover the amount awarded him; and that in respect to his cross-complaint for the value of such work his action was prematurely brought.

From a reading of the whole record we are unable to say, however, that the court was in error in reaching the conclusion arrived at by it. Whatever may have been the precise terms of the original oral understanding between the parties as to the extent to which the work of the defendant in leveling and checking the whole of the land, or even the whole or any part of one or more of its several lots, should proceed

before he was entitled to be paid for such work, the record does show that the parties by their conduct in making their settlements from time to time as the products of the land were sold placed their own construction upon the contract in suit, which in effect was that the defendant was to be paid from time to time a specified sum per acre for the work actually done by him, regardless of whether or not the whole or any part of said work had been completed. We are not, therefore, prepared to say that the trial court was in error in interpreting the contract in suit in keeping with the conduct of the parties thereto. Nor can we say from the record before us that the sum awarded to the defendant was not justified by the evidence adduced upon the whole case.

The next and final contention of the plaintiff is that the court erred in its refusal to permit him to testify in rebuttal as to his having ordered a surveyor to make a survey of the land for the purpose of showing the amount of leveling and checking done by the defendant; and was also in error in refusing to permit the surveyor to testify as to what work his survey showed to have been done by the defendant. Had this case been tried alone, there could be no doubt that the ruling of the trial court in refusing to permit the introduction of this offered evidence upon the objection that it was not rebuttal would be error. It was clearly in proper rebuttal of the defendant's evidence in support of his cross-complaint in this action; but whether it was prejudicial error sufficient to require a reversal of the judgment is another question. The only matter to which the plaintiff was called in rebuttal was as to his having ordered the survey. This would seem to be rather immaterial, for whether or not the plaintiff had ordered the survey would not affect the integrity or value of the survey or of the surveyor's testimony regarding it had he been allowed to so testify. The material error, if any, lay in the refusal of the court to permit the testimony of the surveyor to be given; but in this respect the record shows that the surveyor, when called as a witness by plaintiff, did testify without objection to the extent of identifying the maps which he had made purporting to show the amount of leveling and checking which had been done by the defendant upon the land. These maps were then offered and admitted in evidence, and it was after these were before the court that the objection was for the first time made and

sustained to the questions asked of the surveyor as to the leveling and checking of the land. The maps are not before us; and we are therefore unable to say that the evidence of the surveyor, if presented, would have added anything to what had already been shown upon the face of his map. The burden was upon the appellant to affirmatively show reversible error of the court in its ruling in respect to this matter, and we cannot say that such error appears in the absence of some affirmative showing or claim that the testimony of the surveyor would have added anything to that which had been already exemplified on the face of his maps. Aside from this, however, there is no record here as to what the issues were in the action for unlawful detainer, and in which it may well be that the evidence above offered would not have been proper rebuttal. It does appear, however, that upon the trial the plaintiff did assume to testify in chief as to the deficiencies in the defendant's work. The trial court, with the record of both cases before it, held that the plaintiff having gone into the matter in chief should have exhausted his proofs. In view of the state of the record, we are unable to say that in so doing the court abused the discretion with which by the code it is invested as to the order of proof in the dual trial before it.

Judgment affirmed.

Kerrigan, J., and Richards, J., concurred.

[Civ. No. 1644. Third Appellate District.—February 27, 1917.]

WALTER W. CHENOWETH, Petitioner, *v.* JOHN S. CHAMBERS, as Controller, etc., Respondent.

CONSTITUTIONAL LAW—HOLDING OF CIVIL OFFICE BY MEMBER OF LEGISLATURE—APPLICABILITY OF AMENDMENT.—The amendment of section 19 of article IV of the constitution, which went into effect December 21, 1916, providing that no senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under the state, is not confined in its application to senators and assemblymen to be elected after such date, but is applicable to members of the legislature whose terms began before that date and had not expired at the time the amendment went into effect.

ID.—“TERM” DEFINED.—The word “term” used in the section refers to the period for which the member was elected and not merely to his incumbency.

ID.—“SHALL” DEFINED.—The word “shall” in such section is used as a word of command, in accordance with the constitution, that its provisions “are mandatory and prohibitory, unless by express words they are declared to be otherwise,” and neither legally nor grammatically does it denote futurity.

ID.—STATUTORY CONSTRUCTION — UNAMBIGUOUS WORDS.—Where the words of a statute are not ambiguous and their effect is not absurd, the court will not give it other than its plain meaning, although it may appear probable that a different object was in the mind of the legislature.

APPLICATION for a Writ of Mandate originally made to the District Court of Appeal for the Third Appellate District to compel the State Controller to issue his warrant for a portion of petitioner’s salary as auditor of the state board of prison directors.

The facts are stated in the opinion of the court.

Garret W. McEnerney, A. F. Burke, and Downey, Pullen & Downey, for Petitioner

U. S. Webb, Attorney-General, and Robert T. McKisick, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—Petitioner seeks the writ of mandate to compel respondent to issue his warrant for the payment of a portion of petitioner’s salary. Petitioner was elected a member of the assembly for the fourteenth assembly district at the general election of November 3, 1914. His term of office began on the first Monday after the first day of January, 1915, and ended, by operation of law, on January 8, 1917. He duly qualified as such assemblyman and performed his duties as a member of the assembly at the forty-first regular session thereof and also at the special session held in January, 1916. He resigned his office as assemblyman on December 19, 1916, and his resignation was duly accepted by the Governor. He had previously, but since his election as assemblyman, been appointed auditor of the state board of prison directors and served in that capacity during the entire month of December at the Folsom state prison. He was paid

for his services prior to December 19, 1916, but was denied a warrant for the balance of that month's services.

The action of the controller is based upon amended section 19, article IV, of the constitution, which took effect December 21, 1916, and reads as follows: "No senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state; provided, that this provision shall not apply to any office filled by election by the people."

"It is the contention of the petitioner," reads his brief, "that the amendment is inapplicable to him for two reasons: (1st), the amendment is prospective only in its operation and therefore does not affect senators or members of the assembly who, like the petitioner, were elected before the amendment took effect; and (2d), the petitioner had ceased to be a 'member of the assembly' before the amendment took effect and therefore at no time during the operation of the amendment was within the subject matter of the amendment or affected by it."

Section 19 of article IV formerly provided that "No senator or assemblyman shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which have been increased, during such term, except such offices as may be filled by election by the people."

The amended section is much more sweeping than its progenitor, for it applies to all offices, other than elective offices, and forbids the holding or accepting by a senator or assemblyman of any office, trust, or employment under this state, "during the term for which he shall have been elected." The purpose of the amendment, as stated by one of its proponents in the official argument addressed to the electors, was to bring the constitution into harmony with the American theory of government, that "those who execute the laws should not be the same individuals as those who make the laws"; and for the further reason "that a legislator who is holding a position on the state pay-roll is too apt to allow the wishes of the one responsible for his appointment to decide the manner in which his vote shall be cast. A man in such a position is, to say the least, not in that independent frame of mind which should be possessed by the ideal legislator."

The question here is: Was it intended to apply to petitioner, whose term of office began before the adoption of the amendment and had not expired at the time it went into effect? And, if so intended, could he evade its operation by resigning before the amendment took effect?

We may safely accept as rules of construction what was said in *Smith v. Union Oil Co.*, 166 Cal. 217, [135 Pac. 966], cited by petitioner: "Where the words of a statute are not ambiguous and their effect is not absurd, the court will not give it other than its plain meaning, although it may appear probable that a different object was in the mind of the legislature." No question arises here as to what the people desired to accomplish by adopting this amendment. Its object is plain enough and is manifest on its face.

The word "term" used in the section refers, we think, to the period for which the petitioner was elected and not merely to his incumbency. (*Rice v. National City*, 132 Cal. 354, [64 Pac. 580].) When we speak of the "term" for which an officer has been elected we mean the period of time fixed by statute during which he may serve and not to the time he may happen to serve. Said the court in *Ellis v. Lennon*, 86 Mich. 468, [49 N. W. 308]: "The term for which respondent was elected is clearly defined by the charter and the language, 'the term for which he was elected,' has a clear and well-defined meaning. He was elected to serve for two years, whether he served that time or not. The language used in the statute fixes the period of his ineligibility which would have attached in the absence of that language." In the instant case the statute fixed the term of petitioner's office, as assemblyman.

We need not consider the effect of petitioner's resignation prior to the going into effect of the amendment. If the section applies to a senator or assemblyman whose term of office had not expired on December 21, 1916, we do not think that petitioner succeeded in evading its force by his resignation prior to December 21st, for the section deals with a fixed period of time, to wit, the "term" of the officer and not to the period of his incumbency.

The House of Representatives of the state of Maine submitted certain questions to the supreme court of that state, but the interrogatories did not reach the court until after the legislature had adjourned. For this and other reasons

a majority of the court declined to respond to the request. Three of the judges dissented from this refusal, and, in answer to one of the interrogatories, said: "The constitution in terms (art. IV, pt. III, sec. 10) prohibits the appointment of a senator or representative, during the term for which he shall have been elected, to any civil office of profit under this state, which shall have been created or the emoluments of which increased during such term; i. e., the term for which he was elected. As to such officers the appointment itself is prohibited, and the prohibition continues, not only while the member retains his seat in the legislature, but continues until the expiration of the term for which he was elected. He cannot, therefore, be appointed to such office during that term, even though he has resigned his seat in the legislature." (*Advisory Opinion to Governor*, 49 Fla. 269, [39 South. 63]; *Ellis v. Lennon*, 86 Mich. 468, [49 N. W. 308]; *People ex rel. Sherwood v. State Board of Commissioners*, 129 N. Y. 360, [29 N. E. 355].)

Respondent concedes that the amendment was not intended to nor does it operate retroactively. His contention is that it should be given prospective effect from and after December 21, 1916. There is no disagreement among counsel as to the fact that the amendment went into effect on that date. Petitioner's contention is that it was intended to apply only to senators and assemblymen thereafter to be elected, and that this is made manifest by the language employed; that the amendment speaks only in terms of futurity; that it disqualifies only those "who shall be elected; and further provides that the disqualification shall operate only during the term for which they *shall have been elected*"; thus "expressly and in two ways indicates the intention of the framers that it should have a prospective operation only." This interpretation means that senators chosen when petitioner was elected are not disqualified for two years from and after the first Monday in the year 1917. If the amendment had been proposed by the legislature, a possible inference might arise that the members did not intend to disqualify themselves. The amendment, however, was proposed by the people at large, through the initiative, and we may safely assume what was common knowledge that it was intended to reach a practice in state administration of many years' standing and which the people believed should be presently eradicated. The

amendment had its origin in a spirit for reform that permeated the state, and was intended to cure what the people believed to be a present existing evil and not merely one likely to arise in the future. Did they so express their intent as to make it imperative on the court, under accepted rules of construction, to hold, as is now contended, that "grammatically (and hence legally) the amendment is limited in its operation to such senators and assemblymen as shall be elected after it takes effect?"

The stress of the argument requiring us so to hold rests upon the presumption that the grammatical construction of the language "during the term for which he shall have been elected" compels the conclusion that "the prohibition is expressed in terms of simple futurity, and the class of officers to be affected is grammatically limited to such as should be elected *after* the amendment becomes operative." It is urged that "the verbs are all in the future tense"; that the word "shall" the simple future; that the class of senators and assemblymen to which the act shall apply "is expressed in the *future perfect tense* as senators or assemblymen who *shall have been elected*"; that, in employing the *future perfect tense* the amendment limits its application to senators and assemblymen who shall be elected *after* the amendment takes effect.

We are quite satisfied that the word "shall" where first used lends no force to petitioner's contention. Neither legally nor grammatically does it denote mere futurity. It is used here as a word of command, in accordance with the constitution, that its provisions "are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Const., art. I.) In Fernald's Working Grammar of the English Language, page 141, the distinction between "shall" and "will" is pointed out and the author says the difference between these two auxiliaries "in the expression of future action or state is one requiring careful study." The author states that primarily "shall" denotes obligation. "In the first person it simply denotes future fact. In the second and third person the idea of obligation remains, and is felt to be imposed by the person speaking; hence, you 'shall' or 'they shall' means, I will compel you or them to act. . . . Consequently you (he or they) shall, expresses command or necessity, never simple future action." In the amendment the word "shall" must be read in connection with its context.

"No senator or member of assembly shall," etc., which is a command that senators and assemblymen shall not hold or accept any office. There is here no suggestion of futurity. The language is imperative and is directed to every member of the legislature in the present tense. We do not think that the word "shall" where first used in the provision conveys the idea of futurity at all. On the contrary, it carries with it an implication which should aid us in giving the proper construction to what follows.

The expression "during the term for which he shall have been elected" presents a question of more difficulty. In a strictly grammatical sense the phrase, standing alone, conveys the idea of futurity. Reading the section in its entirety it does not appear to us imperatively to demand a construction contrary to what we have the right to assume the electors, in voting on the amendment, understood to be its purpose and the class of officers to whom it was intended to apply. The phrase or its equivalent is frequently found in statutes and constitutions and the cases show that it is applied to past as well as to future acts or conditions. As was said in *Norris v. Sullivan*, 47 Conn. 474: "The words 'shall have levied' are susceptible of both past and future application; they furnish a convenient form for legislative use when it is desired to give all-inclusive force to a single expression. Therefore, as they may mean future, or past and future, it becomes a question of legislative intent in each statute." Respondent points out that such expressions are so frequently found in statutes that the code of Wisconsin, section 4972, established the following among other rules of construction: "1. The words 'shall have been' include past and future cases." In a Missouri statute with respect to the time of commencing an action there was a proviso "that if any action shall have been commenced within the time prescribed in this section, and the plaintiff therein suffer a nonsuit . . . such plaintiff may commence a new action," etc. This statute was before the court in *Clark et al. v. Kansas City etc. R. R. Co.*, 219 Mo. 524, [118 S. W. 40], and it was there contended that the grammatical construction of the statute made it inapplicable to actions commenced before its passage. We venture to quote at some length from the opinion which seems to us not only sound law but good, ordinary common sense:

"Courts have no right, by construction, to substitute their ideas of legislative intent for that unmistakably held by the legislature and unmistakably expressed in legislative words. *Expressum facit cessare tacitum.* We must not interpret where there is no need of it.

"Therefore, if the law says that it is to operate only upon cases to be brought thereafter, if it in terms excludes pending cases, then we have nothing to do but to enforce it. Attending to that view, we do not read the statute as contended by counsel for the respondent. Its use of the future form of the verb, 'commence,' as developed in the phrase 'shall have been commenced,' in correct usage in the discourse of good writers and speakers, includes the past as well as the future. That phraseology in a statute has been held by the supreme court of Connecticut to be 'susceptible of both past and future application; they [the words] furnish a convenient form for legislative use when it is desired to give all-inclusive force to a single expression. Therefore as they may mean future, or past and future, it becomes a question of legislative intent in each statute.' . . .

"Our own statute on construction (R. S. 1899, sec. 4160), requires that 'words and phrases shall be taken in their plain and ordinary or usual sense.' With that rule in mind, let us illustrate: If a rule were bulletined on a given Tuesday by the headmaster in charge of teaching grammar in a school, as follows: 'No pupil shall be whipped twice for a mistake which *shall have been made* in parsing' would any boy in the school take the rule to apply only to *future* mistakes in parsing? Could he not well plead the rule (with high hope of its allowance) if his mistake and one flogging occurred on the Monday prior and another flogging was threatened on the Wednesday subsequent to the rule for the same mistake?

"Or if C, a plantation owner, is building barns and writes his overseer: 'Paint all barns red that *shall have been commenced*,' would B, his overseer, take that command to mean that only barns commenced *after* the order should be painted red?

"Nay, if a very stickler for grammatical precision—a John Horne Tooke, a Lindley Murray or a Dr. Marsh—should make a New Year's rule for his self-guidance, viz.: 'If my reading of any book *shall have been commenced*, I will finish it,' would he construe his own rule not to include Anatomy or Mel-

ancholy, or the Decline and Fall, put in reading on the prior Christmas?

"We may presume all legislators grammarians, but that presumption would not drive us to the conclusion that they meant only future action when they wrote 'shall have been commenced.' "

Section 19, article V, of the constitution was amended in 1908 and relates to the compensation of state officers. It reads: "The governor, . . . and surveyor-general shall, at stated times during their continuance in office, receive for their services a compensation which shall not be increased or diminished *during the term for which they shall have been elected*, which compensation is hereby fixed for the following officers as follows: . . . such compensation to be in full for all services by them respectively rendered in any official capacity or employment whatsoever during their respective terms of office; provided, however, that the legislature may, by law, diminish the compensation of any or all of such officers, but in no case shall have the power to increase the same above the sums hereby fixed by this constitution." The salaries of the officers named were materially increased by the amendment. It went into effect November 3, 1908. Kingsbury, the then surveyor-general, demanded of the controller a warrant for the unpaid balance due him for the month of November, 1908, calculated at the rate fixed for his salary as surveyor-general by the amendment. His demand was denied and he brought mandate in this court, reported in the case entitled *Kingsbury v. Nye*, 9 Cal. App. 574, [99 Pac. 985]. Both parties seek support in this case. The point now under discussion was distinctly raised and it was contended by respondent "the amendment must be deemed to have a prospective operation and to apply to the offices enumerated, upon the expiration of the terms of the present incumbents and not before." In reply we said: "The point made that the rule requiring that the amendment be given a prospective effect necessarily postpones its operation until after the present terms expire, and that any other view would be to give a retroactive effect to the amendment, we think, cannot be sustained. The amendment, as we apply it, is in no sense given a retroactive operation; it is simply given force from and after its ratification, and it operates prospectively thenceforward. If, as we have held, the amendment

took effect upon its ratification, and operated, as respondent admits, prospectively, we know of no authority for holding that its operation must be postponed until the terms of the incumbents have expired." The rules of grammar were not invoked in that case. The decision, favorable to petitioner, turned largely on the view we took that the inhibition to the increasing of salaries was addressed to the legislature. Said the court: "The amendment under review having gone into operation from the date of its adoption, it must be given effect thenceforward, unless we can say that some restriction has been put upon its operation, either by the terms of the amendment or by implication derived from the terms so used. We can find nothing in any of the terms, and nothing is claimed to be found therein, except the provision as to the increase or diminution of the compensation, which we hold was addressed to the legislature alone. Had such intention dwelt in the minds of the proponents of the amendment, it would have been easy and simple to restrict its effect and withhold its benefits from present incumbents." The case is not directly in point, but it must be admitted that the value of the decision would be greatly impaired if the strict rule of grammar now urged should be held to prevail instead of the more reasonable rule of construction adopted by the courts.

Petitioner cites many cases in support of this contention where the word "shall" is used or verbs are expressed in the future perfect tense. For example: A statute conferring certain rights upon a person who had paid an assessment in the event that such assessment "shall be set aside, altered or reduced," and it was held "that such assessments only should be embraced as should be vacated, altered or reduced after the act took effect." (*City of Elizabeth v. Hill*, 39 N. J. L. 555.) A statute provided that "Whenever a married man shall be deserted by his wife, or a married woman shall be deserted by her husband, for the space of one year . . . he or she may bring an action," etc. An action was brought July 21, 1874, alleging desertion July 17, 1873. The court held that the language of the statute evidenced an intention that it should have a prospective operation only. (*Giles v. Giles*, 22 Minn. 348.) A statute read: "All and singular the goods and chattels, lands, tenements and real estate of every person against whom any judgment shall be obtained in any court of record either at law or in equity," etc. The court held

the statute to apply only to judgments entered subsequently to the passage of the act. (*Jones v. Stockgrowers' Nat. Bank*, 17 Colo. App. 79, [67 Pac. 177].) Section 5, article VI, of the California constitution of 1879 provided that "All actions for the recovery of the possession of . . . real estate, shall be commenced in the county," etc. It was held in *Gurnee v. Superior Court*, 58 Cal. 88, that "neither in its language nor in its spirit does it apply to actions already commenced."

These cases are cited as examples of the simple future tense. Aside from the element of futurity said to influence the decisions, it seems to us that the character of the statutes and the purposes contemplated by them would have required that they be given a prospective operation unless a contrary intention was made clearly to appear. Take, for example, the Minnesota case, giving an action where the husband or wife, as the case may be, "shall be deserted for the space of one year." Obviously, it would violate the rules of construction to give such a statute a retroactive operation. So also it may be said of a Michigan statute (cited as an example of the future perfect tense), giving the court power to grant a divorce when the defendant "shall have become an habitual drunkard." [Mich. Comp. Laws 1857, sec. 3227.] The court, in reversing the judgment granting the wife a divorce, said: "To bring the case within the fair intention of this statute, we think the defendant must have become an habitual drunkard after the marriage." The evidence was that the habits of the husband with respect to drink were substantially the same prior to his marriage and that the complainant was well aware of this when she married him. (*Porritt v. Porritt*, 16 Mich. 140.) Another example given as showing the weight accorded to grammatical construction is the case of *State v. Boyd*, 21 Wis. 210. The section of the constitution of Wisconsin is quite similar to section 19, article IV, of our constitution before its amendment in 1916. The relator was elected to an office existing previously to his being chosen a member of the legislature. The emoluments of the office had not been increased when he was elected to it, but were increased by a subsequent enactment while he was a member of the legislature, but subsequent to his election to the office of county judge. The constitution provided: "No member of the legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which

shall have been created or the emoluments of which shall have been increased during the term for which he was elected.” The court said: That according to the most natural grammatical construction of the provision, it “only forbids a member of the legislature, while such member, from being appointed or elected to any civil office which shall have been *previously* created, or the emoluments of which shall have been *previously* increased, during the term for which he was elected.” It was said, arguendo: “The future perfect tense is used—an office ‘which shall have been created, or the emoluments of which shall have been increased,’ etc.—indicating a future action done and completed before the appointment or election, the other future action to which it refers.” The writer of the opinion stated that this construction is not the one he was at first disposed to place upon the provision; that it seemed to him “that the purity and fidelity of the representative, as well as of the public interest, would be most effectually secured by excluding those persons from office who had been concerned in creating it or rendering it more lucrative. But the author of the constitution did deem it expedient to adopt such a rule of disqualification, and a much more restricted one has found its place in that instrument.” We are not quite sure but that the learned justice’s first impressions would have led to a safer solution than was finally reached. However, the question there was as to Boyd’s right to an office which he held when elected a member of the legislature, and rules of construction, perhaps, would not have justified ousting him from that office under a provision which plainly provided that the office to which he was forbidden to be elected or appointed was an office created during the term he was serving in the legislature and not an office to which he was previously elected. The court said that the case was “not within the language of the provision, according to its most natural grammatical construction.” But suppose Boyd had been elected to and was holding a civil office after (i. e., during the term for which) he had been elected a member of the legislature, a different case would have arisen. And it is just such a different case as is presented by the amendment we are considering—no member of the assembly shall, during the term for which he shall have been elected, hold or accept any office. Under the old section the disqualification came about by his participating in the creation of the office

or the increase of its emoluments. Under the new section he is forbidden to hold or accept any office during the term for which he shall have been elected. His participation in creating the office is no longer the evil to guard against. The evil intended to be combated by the amendment was the holding or accepting by members of the legislature any office under this state during the term of office as such members. No possible reason can be suggested why the amendment did not operate upon every member of the legislature at the moment it took effect. Nor can any good reason be given why its operation should be limited to members only who shall have been elected after December 21, 1916, since without question the mischief which it was designed to remedy was present and quite as menacing as it would be two or four years thereafter, and since the class upon whom it was to operate was the same on that date as it would be at some future date. That it was so intended when submitted to the people there can be no doubt, and we do not think the language used to express that intention compels us, under settled canons of construction, to nullify that intention, or would justify its nullification.

Respondent cites several cases illustrative of the fact that expressions in statutes in the future perfect tense are not necessarily required to be given a strictly grammatical interpretation. One of these examples is found in *Lane v. Lane* (Q. B.), reported in volume 65 N. S. Law Journal Reports (1896), page 63. The statute involved was section 4 of the Married Woman Act, 1895, reading as follows: "Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of section 43 of the Offenses Against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than £5, or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or willfully neglecting to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction . . . for an order or orders under this Act." The act took effect January 1, 1896. The wife

applied to the justices of Glamorganshire for an order under said section, alleging the persistent cruelty of her husband. All the acts complained of were committed previous to January 1, 1896. The justices held that the section was not retrospective in its effect, and they had no jurisdiction. The wife appealed. Reversing and remanding the case there were separate opinions of the judges. The president, Sir F. H. Jeune, said: "But upon the language of the section and the reason of the thing the matter seems to be extremely clear. The words 'shall have been' are hardly ambiguous; in my view, they deal with all offenses, past and future (considered with regard to the date of the act), and not only to future offenses." Justice Barnes said: "Looking at the wording of the section and at the whole act, the question seems free from any doubt, and in my judgment the language used in section 4 is not at all ambiguous. It seems quite clear to me that the expression 'any married woman whose husband shall have been guilty of persistent cruelty to her may apply,' etc., deals with all cases of persistent cruelty which have happened prior to the decision of the court." They not only looked to the language employed but also "to the reason of the thing."

The case of *Queen v. Inhabitants of Christ-Church*, reported in Law Journal 1849, Michaelmas Term, 12 Victoria, page 28, is cited. There the court was considering a statute providing, among other things, that a pauper who "shall have resided" within the parish for a period of five years fixed by the statute shall thereafter be irremovable. The controversy arose in an attempt of St. John's Parish to deport one Mary Sweeny and her four children to the parish of Christ-Church. The order of removal was sustained, Lord Denman delivering the opinion. We cannot give his reasoning in full. Referring to the statute he said: "The word *shall* denotes rather the happening of the event, on which the exception is to apply, within the time assumed to have been before computed, than the future relation of such event to the time when the statute passed. It denotes the subjunctive mood rather than the future time." He stated that the claim that there is a presumption against a retrospective statute being intended "is founded on a misconception. The statute is prospective only. Its direct operation is only on removal; after it has passed it does not alter existing rights in respect of completed removals.

A space of time is an essential ingredient in the case to which it applies, and this space of time may consist in part of time passed before the statute passed, as is the case with statutes in limitation and prescription, but they are not therefore classed with the retrospective statutes."

A Minnesota statute which provided "that every dwelling-house or other building, for the construction, erection or repairs of which any person shall have a claim for materials furnished or services rendered, shall, with the land," etc., "be subject." In *Mason & Craig v. Heyward*, 5 Minn. 74, the court said: "The words, 'shall have a claim,' mean and refer to the time of the passage of the act, and subsequently, and comprehend claims of such nature existing when the act was passed."

Further reference to cases seems unnecessary. The future form of verbs is so frequently used by writers of statutes and constitutions and literary productions to include the past as well as the future, that we must regard it as correct usage.

We do not think that the amendment is couched in such language as to make it impossible or unreasonable for us to hold, without violating settled rules of construction, that it was intended to apply to a member of the legislature whose term began before December 21, 1916, and did not terminate until after that date.

The writ is denied.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 26, 1917. Angellotti, C. J., and Sloss, J., dissented from the order denying a hearing in the supreme court.

[Civ. No. 1637. Third Appellate District.—February 27, 1917.]

BEATRICE GOLDSTONE, Appellant, v. **COLUMBIA LIFE & TRUST COMPANY** (a Corporation), Respondent.

INSURANCE—PROCURING OF POLICY BY UNLICENSED AGENT—VIOLATION OF STATUTE—LIABILITY OF INSURER.—A life insurance company cannot, by violating the provisions of section 633 of the Political Code, which declares that no person shall in this state act as the agent or solicitor of any insurance company doing business herein until he has produced to the commissioner, and filed with him, a duplicate power of attorney from the company, or its authorized agent, authorizing him to act as such agent or commissioner, absolve itself from liability on a contract that it has authorized or ratified, although the contract may have been secured by a person not an agent or solicitor in the full meaning of the statute. Such statutory provisions as to agents do not change the rule of law as to principal and agent between the company and the policy-holder, and the company attempting to evade such statute is nevertheless bound to its policy-holders as though the statute had been complied with.

Id.—FALSE ANSWERS IN APPLICATION—FRAUD OF AGENT—RECOVERY ON POLICY.—Where false answers are written in an application for life insurance, it is the duty of the insured after delivery of the policy to notify the insurer of the fraud, and where the same is not done, the fraudulent act of the agent is thereby approved, and no recovery can be had on the policy.

Id.—REPUDIATION OF FRAUD—DUTY OF INSURED.—A delay of four months in repudiating the fraud of the agent is fatal to recovery, as it is the duty of the insured to act promptly.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Albert Jacoby, for Appellant.

Wood, Montague, Hunt & Cunningham, Gavin McNab, and Nat Schmulowitz, for Respondent.

BURNETT, J.—By direction of the court and on motion of respondent a verdict in favor of the company was rendered

by a jury and the appeal is from a judgment entered thereon.

Plaintiff, widow of one Jacob Goldstone, brought the action as beneficiary named in a life insurance policy issued by respondent to said Jacob Goldstone on September 26, 1913. It appears that one of the conditions of the policy was as follows: "This contract of insurance is made in consideration of the application for this policy, a copy of which is hereto attached and which application is hereby made a part of this contract." In said application, signed by said Goldstone, appears this covenant: "I hereby agree that the statements herein contained, together with the statements made by me to the medical examiner and contained in part 2 of this application, are hereby warranted to be true, full and correct as facts, and that this application, together with the policy which may be issued, shall constitute the contract between me and the company."

It is the claim of respondent, fully set up in its answer, that, in violation of said agreement and for the purpose of defrauding the company, the insured gave false answers to certain questions that were material to the risk, and that therefore the company was relieved of any liability under said policy. On the other hand, appellant contended at the trial that the answers were written in by an agent of the company without the knowledge or connivance of the insured, and therefore the insurer cannot take advantage of its own wrong, but is charged with the same responsibility as though the answers were true.

The questions were as follows: (1) "Have you ever applied to any company or society or order for insurance without receiving a policy or certificate of the exact kind, rate, and amount applied for, or for reinstatement of a lapsed policy or certificate without being reinstated?" and (2) "Is any negotiation or application for other insurance now pending or contemplated?" Each question was answered in the negative, whereas, admittedly, the truth is that, on September 22, 1902, Goldstone had made an ineffectual application for life insurance to the Northwestern Mutual Life Insurance Company of Milwaukee; likewise, in November, 1903, to the Guardian Life Insurance Company of New York; similarly, in August, 1913, to the Equitable Life Assurance Society of the United States; also to the New York Life Insurance Company, in August, 1902, and another, to the same com-

pany, in 1905; furthermore, in July, 1913, he made another application to the said New York Life Insurance Company, which application was still pending at the time the application herein concerned was made.

In pursuance of her contention plaintiff called as a witness one S. J. Levy, from whose testimony it appears that he solicited from said Goldstone the said insurance; that he was the duly authorized agent of the said New York Life Insurance Company, and had issued to him, pursuant to section 633 of the Political Code of this state, as such agent, a power of attorney; that, prior to his interview with Goldstone, he was visited at his office at 14 Montgomery Street, San Francisco, by one B. F. Bernsten, then the acknowledged and admitted general agent of defendant for the state of California; that said Bernsten requested Levy to act as the agent of respondent in and around the territory of San Francisco, but was informed by the latter that he could not do so on account of his connection with the New York Life, a competing company, whereupon Bernsten, in order to get around and evade the law, proposed as follows: "Well, make the contract in the name of your wife, make her the agent and you can be the active man in obtaining the business whatever it is." Levy continued: "Under those circumstances, we entered into an agreement whereby the business was to be solicited by myself, but Mrs. Levy was to be known as the agent, in order not to conflict with the contract that I had with the New York Life Insurance Company." Mrs. Levy was thereupon appointed such agent, and Mr. Levy, in accordance with his agreement with Bernsten, proceeded to solicit, procure, and write insurance for the defendant company, and among others he approached Goldstone, submitted to him for his signature said application for insurance, collected the premium, and subsequently delivered the policy in question to said deceased. Appellant then attempted to show by said witness that he wrote in the answers to said questions without the knowledge of the insured, but the court sustained an objection, and it was not permitted. The ruling was based upon the court's understanding of the force and effect of said section 633 of the Political Code, providing that "No person shall in this state act as the agent or solicitor of any insurance company doing business in this state until he has produced to the commissioner, and filed with him, a duplicate

power of attorney from the company, or its authorized agent, authorizing him to act as such agent or solicitor," and providing also for the issuance by said commissioner of a license to such agent. The court, in holding that the case falls within said section, declared that it was enacted to the end that, if a broker or anybody else comes to one selling life insurance, there may be a safe way for the one solicited to find out whether the company is authorized to do business in the state and also whether the solicitor is authorized to solicit insurance, and the court seemed to be of the opinion that no one acting as an agent could bind the company unless he was so commissioned, and that a person dealing with a solicitor not so authorized does so at his peril.

Said section, no doubt, was enacted for the protection of the public as well as of the insurance companies, and its provisions, of course, should be complied with. No company should knowingly fail to regard its requirement nor should any person assume to act as agent or solicitor without said power of attorney and said license. However, as far as the company is concerned, we do not understand that by its violation of said statute it may absolve itself from liability for a contract that it has authorized or ratified, although the contract may have been secured by a person not an agent or solicitor in the full meaning of the statute. The reasonable rule, we think, and one sustained by the authorities is that such statutory provisions as to agents do not change the rule of law as to principal and agent between the company and the policy-holder, and that the company attempting to evade such statute is nevertheless bound to its policy-holders, as though the statute had been complied with. We think, also, that there is justification in the record for the contention that said S. J. Levy was authorized by the company to solicit said insurance, and also that his act in so doing was subsequently ratified. It would follow that the court was technically in error in sustaining the objection to the questions asked of the witness. It would seem almost incredible that one of some standing, as Levy must have been, would be guilty of such reprehensible and even despicable conduct as to attempt deliberately the perpetration of a fraud upon the company and the deceased, but we must assume that his answers, if given, would have presented such a situation.

However, we need not go into that at length as, notwithstanding such error, under the admitted facts, it must be held, we think, that the law demands the verdict that was rendered.

As already seen, the policy was immediately delivered to Goldstone. It was his duty to read it, and we must assume that he did so. (*Long v. Newman*, 10 Cal. App. 430, [102 Pac. 534].) He knew, therefore, that his application as well as the certificate of the physician, each of which was an integral part of the policy and the consideration therefor, contained two material and vital statements that were false. His legal and moral duty was then to notify the company of the fraud that had been attempted. By his silence he virtually approved of the fraudulent act of the agent and became responsible for it. By his conduct he made Levy his agent as well as the agent of the company, and the forfeiture of the policy is the price of his folly. If he had pursued the course required by good conscience, the company might have excused the misrepresentation, but, of course, that is merely problematical. He could at least have secured a return of the premium paid, but by his acquiescence he denied himself any relief from the wicked act of the agent of the company.

This feature of the case is covered by the decision of the supreme court in *Madsen v. Maryland Casualty Co.*, 168 Cal. 204, [142 Pac. 51], wherein one Graff, a soliciting agent for defendant, solicited the insurance from plaintiff who was very deaf, as was well known to said Graff. The application for the policy was filled out by Graff, and, without being signed, or read to or by plaintiff, was sent to the general agent of defendant. It contained a warranty to the effect that plaintiff was neither partially nor totally deaf. A policy was issued by the defendant and sent to plaintiff through the mail. In reversing the case the court said: "By accepting and retaining the contract without objection plaintiff was bound by its terms and cannot now be heard to say that he did not read it or know its terms." Many cases are therein cited in support of the principle. We call specific attention to only two of them. One is the familiar case of *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, [29 L. Ed. 934, 6 Sup. Ct. Rep. 837], wherein the court, through Mr. Justice Field, said: "There is another view of this case equally fatal to a recovery; assuming that the answers of the assured were falsified, as alleged, the fact would be at once

disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided."

In *Quinlan v. Providence etc. Ins. Co.*, 133 N. Y. 356, [28 Am. St. Rep. 645, 31 N. E. 31], it is said: "In determining the question of liability in this case, it is immaterial whether the plaintiff read the policy or not, or that he had no actual knowledge of the conditions or of the limitations of the power of Kelsey. The conditions and limitations were a part of the contract, and he was bound to take notice of them, and is not excused upon the plea that he omitted to acquaint himself with the provisions of the policy."

Nor do we think there is any force in the contention that the Madsen case should not be considered controlling for the reason that therein the agent was a mere soliciting agent and the time during which the policy was in possession of the insured was a period of several years. S. J. Levy was no more than a soliciting agent here. At least, he had no authority to waive warranties for the company, and was therefore in no better position in that respect than a soliciting agent. This question of the authority of an agent to waive conditions is learnedly discussed in *Sharman v. Continental Ins. Co.*, 167 Cal. 117, [52 L. R. A. (N. S.) 670, 138 Pac. 708], and we need not further consider it.

As to the time, a delay of four months in repudiating the fraud is as fatal as a delay of four years. It is the duty of the insured to act promptly. He cannot speculate with death. It is, of course, always imminent, and at any moment it may claim even the most robust. The situation of the insured and the nature of the contract made it his imperative duty to act immediately. The importance of such speedy action is certainly emphasized by the circumstance of his death within a little less than four months from the time the policy was issued. In the absence of any claim that the delay was

caused by any act of respondent or that it was unavoidable for any reason, we consider it fatal to a recovery.

The cases generally seem to take it for granted that the insured must act with great promptness in such contingency. We may refer specifically to only one, decided by the supreme court of Wisconsin, *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, [89 N. W. 538, 92 N. W. 246], reported with an exhaustive note in 67 L. R. A. 706, wherein a similar question was involved. Therein it was held that "If a person receives a policy of insurance ostensibly in response to an application therefor, which he signed and parted with in the belief, induced by the fraud of the agent taking the same, that it called for a policy different from that which it called for in fact, he is bound, as a matter of law, to examine the policy within a reasonable time after it comes to his hand, and to discover obvious departures therein from the one which he supposed he was to get, and promptly, upon discovering the same, to rescind the transaction, give the company due notice thereof, and do all on his part which justice requires to restore the former situation, or he will be held to have accepted the policy as satisfying his application, so as to be precluded from rescinding the same," and it was further held that the "reasonable time" began to run when he received the policy, and that a delay of four months and a half before moving to rescind is too long a time.

We think the judgment should be affirmed, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 26, 1917.

[Civ. No. 2312. Second Appellate District.—February 28, 1917.]

CONSOLIDATED LUMBER COMPANY (a Corporation), Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY et al., Respondents.

JUSTICE'S COURT APPEAL—EXCEPTION TO SURETIES ON UNDERTAKING—SERVICE AND FILING OF NOTICE.—Notice of exception to sureties on an undertaking on appeal from a justice's court must be served upon the appellant as well as filed with the justice, and the exception is not complete until both acts are performed.

APPLICATION for a Writ of Prohibition originally made to the District Court of Appeal for the Second Appellate District to restrain the hearing of a Justice's Court appeal.

The facts are stated in the opinion of the court.

McClure & Turner, for Petitioner.

H. E. Gleason, for Respondents.

THE COURT.—An alternative writ of prohibition was issued herein under which the respondent superior court was required to show cause why it should not be prohibited from proceeding further in a certain action entitled *Consolidated Lumber Co. v. F. A. Shorey*, where, after judgment in a justice's court, the defendant appealed to the said superior court.

Within five days after the defendant Shorey had filed in the justice's court his undertaking on appeal, the plaintiff filed in the justice's court a notice of exception to the sureties who executed the undertaking on appeal, but did not serve upon the defendant or his attorney any notice of such exception. No justification of sureties was had, and upon that ground the plaintiff moved the superior court to dismiss the appeal. The superior court denied the motion and has set down the case upon its calendar for trial.

Section 978a of the Code of Civil Procedure, referring to undertakings on appeal from justices' courts and the exceptions thereto, states that “the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their

affidavits, the appeal must be regarded as if no such undertaking had been given." The same words were formerly contained in section 978. It will be observed that the statute is silent as to the manner in which the exception shall be taken, and if the matter had not been determined by decision, we would be inclined to hold that such exception might be taken in a justice's court orally, and that it would be sufficient to have the fact noted in the justice's docket without service or filing of any notice whatever. The corresponding provision (Code Civ. Proc., sec. 948), referring to exceptions to sureties on appeals from the superior court, in terms requires that notice of exception to sureties be served upon the appellant. The omission to state any such requirement in section 978a strongly argues that a less formal mode of exception was intended in the case of an appeal from a justice's court. However, this question was before the supreme court in *Reynolds v. County Court of San Joaquin County*, 47 Cal. 604, where the court said: "The mere filing of such an exception with the justice of the peace after appeal taken does not seem to be authorized by the statute, and it is of course unreasonable to hold the appellant in default when he had no notice in law or fact, that further justification of sureties had been required by his adversary." In *Budd v. Superior Court*, 14 Cal. App. 256, [111 Pac. 628], this court held that the notice of exception to sureties must be filed with the justice and that no such exception will be deemed to be complete until such notice is filed. With that ruling and the reasons for it as there stated, we are satisfied; but it is not inconsistent therewith to further hold that the notice must be served upon the appellant. In *Budd v. Superior Court* it was intimated that such service upon the opposite party of the notice of exception to sureties is not essential, and we repeat that suggestion in *McCarty v. Superior Court*, 30 Cal. App. 1, [159 Pac. 736]. But in these decisions the only question directly at issue was upon the contention that the notice of exception must be filed. Basing our decision upon *Reynolds v. County Court of San Joaquin County*, 47 Cal. 604, we now hold and determine that the notice must be served as well as filed; but that the exception is not complete until both served and filed.

The alternative writ is discharged and petition for peremptory writ is denied.

[Civ. No. 1950. First Appellate District.—February 28, 1917.]

J. G. FOLEY, Respondent, v. CITY OF OAKLAND (a Municipal Corporation), Appellant.

MUNICIPAL CORPORATIONS—CITY OF OAKLAND—ABOLITION OF CLERKS AND OFFICES—POWER OF COUNCIL—CONSTRUCTION OF CHARTER.—The general power vested in the council of the city of Oakland by section 31 of its charter (Stats. 1911, pt. II, p. 1551) to create and abolish clerkships and offices is not abridged in so far as those persons are concerned who were in the employment of the municipality on September 1, 1910, by the provision of section 80, declaring that persons employed by the city on that date may retain their employment, subject to classification and reclassification by the civil service board, without further examination, unless removed for cause, or unless it shall be determined by the civil service board that their employment by the city is unnecessary.

APPEAL from a judgment of the Superior Court of Alameda County. Everett J. Brown, Judge.

The facts are stated in the opinion of the court

Paul C. Morf, City Attorney, and W. H. O'Brien, Deputy City Attorney, for Appellant.

Charles A. Beardsley, for Respondent.

KERRIGAN, J.—This is an appeal by the defendant from an adverse judgment. The case involves the proper construction of certain provisions of the charter of the city of Oakland.

The facts of the case may be summarized as follows: The city of Oakland is a municipal corporation governed by a freeholders' charter (Stats. 1911, pt. II, p. 1551). The health department is under the direction of a commission of public health and safety. Ordinance No. 350, N. S., created the position among others of assistant sanitary inspector in that department. The plaintiff was in the employ of the city on September 1, 1910, and was appointed to said office of assistant sanitary inspector. On July 20, 1915, said ordinance was repealed by Ordinance No. 885, N. S., with the consequent abolition of the position held by the plaintiff.

Section 31 of the charter (found at p. 1575 of the statutes of 1911) provides: "The council shall have the power by ordinance to create, consolidate and discontinue offices, deputyships, assistantships and employments other than those prescribed in this charter . . . and also the method by which any office, deputyship, assistantship or employment . . . shall be declared vacant." Section 39 of the charter (Stats. 1911, p. 1577) reads: "The council shall be the governing body of the municipality. It shall exercise the corporate powers of the city, and, subject to the *express* limitations of this charter, shall be vested with all powers of legislation in municipal affairs adequate to a complete system of local government consistent with the constitution of the state." The act of a city council in abolishing an office is an exercise of legislative power (*Downey v. State*, 160 Ind. 578, 582, [67 N. E. 450]; 5 R. C. L. 614). There is no express provision in the charter limiting the legislative power of the council to create or abolish offices or positions other than that contained in that part of section 31 above quoted; in fact it is not contended that the city council has not the general power to create and abolish clerkships and offices. Respondent's position is based on the latter part of section 80 of said charter (Stats. 1911, p. 1605), which section, after enumerating the employees of the city excepted from the civil service provisions of that act, reads: "Provided, that persons employed by the city . . . on September 1, 1910, may retain their employment under the city, subject to classification and reclassification by the civil service board without further examination, unless removed for cause or unless it shall be determined by the civil service board that their employment by the city is unnecessary." Respondent argues that while the city council may have the general power to abolish offices, such power, under the above-noticed portion of section 80, is vested in the civil service board so far as those persons are concerned who were in the employment of the municipality on September 1, 1910.

We think this position cannot be maintained. The civil service board is given power to determine that an employee is unnecessary, and it may perhaps remove him and leave the office vacant but still existing; but the provision of the charter conferring this power falls far short of depriving the city council of its authority to abolish the office itself. On Sep-

tember 1, 1910, the date referred to in section 80 of the charter, the board of freeholders were engaged in framing the present organic act; and doubtless it was deemed expedient not only to give the persons who were at that time in the employ of the municipality civil service standing without examination, but also to subject them to removal only for cause or upon a showing that their employment was unnecessary, instead of leaving them, as are other civil service employees, subject to removal by the heads of the different departments of the city, with a right to appeal to the civil service board. But the charter did not go further in this behalf; and section 80 thereof does not give to the civil service board the power to abolish offices, such power being lodged only in the council.

The judgment is reversed.

Lennon, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 29, 1917, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 26, 1917.

[Civ. No. 2203. Second Appellate District.—February 28, 1917.]

COMPTON LAND COMPANY (a Corporation), Respondent, v. JOHN A. VAUGHAN, Defendant; HENRY S. WOOLNER, Appellant.

VENDOR AND PURCHASER—AGREEMENT RELATING TO REAL PROPERTY—OPTION TO PURCHASE.—A written agreement relating to real property, reciting that the owner had received from the other party thereto a certain sum of money as part payment for the property, followed by a statement of the price and manner of payment, constitutes an option and not an agreement of sale, and such party is not, upon default, entitled to the return of the money paid, where it is further recited in the writing that it is distinctly understood that the instrument is an option exclusively, and that the owner in the event the first payment is made will "execute a good and sufficient agreement of sale," but if not paid, the money shall be retained as "liquidated damages."

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Albert M. Norton, and Henry S. Woolner, for Appellant.

John G. Munholland, for Respondent.

JAMES, J.—The appeal in this case is taken from a judgment entered in favor of the plaintiff. In the complaint facts were set out showing that plaintiff, on or about the 14th of December, 1911, executed in favor of defendant John A. Vaughan a certain writing which is in the complaint called "an option agreement." This agreement related to certain realty. It is alleged that defendant Vaughan failed to comply with the terms and conditions of the agreement and failed to complete the purchase of the real property which was described; it was then alleged that the defendants "claim an estate or interest in said premises adverse to plaintiff by and through said option agreement, which in truth and in fact is void and of no effect." Allegation is made that the option agreement was recorded in the office of the county recorder and remained as a cloud upon plaintiff's title. The prayer was that the option agreement be adjudged void and canceled and satisfied of record, and "that the cloud created thereby be removed," and for general relief. An answer was filed and the case proceeded to trial, with the result as stated.

There was no dispute as to the terms of the writing, which was set out in full together with certain extension indorsements, as an exhibit in the complaint. The agreement was dated December 14, 1911, and recited that the plaintiff had received from Vaughan the sum of three hundred dollars "as part payment for the following described real property." (Here follows a description of the realty affected.) The agreement then contained the following recitations: "The entire price to be paid for the above-described real property is \$28,500.00 and to be paid as follows: \$300.00 cash as hereinbefore mentioned. \$6200.00 on or before ninety days after date. The balance of \$22,000.00 to be divided in six equal payments." The time of the maturity of the notes was then set forth, and further on in the document it was recited

that: "It is distinctly understood that this instrument is an option exclusively, and that the holder of said option has no right to enter on or in any manner assume ownership or possession of any part of said above-described property until above mentioned \$6200.00 is paid and said John A. Vaughan has executed above mentioned notes and the agreement for sale of real estate as herein called for is duly escrowed. A good and sufficient agreement for sale of real estate with a resolution of the Board of Directors deed to be executed and delivered by the said Compton Land Company, . . . on or before the 14th day of March, 1912, . . . If the said payment of \$6200.00 is not paid or tendered on or before the said 14th day of March, 1912, then this contract to be void and of no effect and both parties released from all obligations herein, and in that event the said \$300.00 paid on this date is to be retained by the Compton Land Company as liquidated damages." The alleged option agreement was duly signed by the plaintiff corporation and by John A. Vaughan, defendant. On March 11, 1912, an indorsement was made on the writing, signed by both parties, which recited that "the within option agreement is hereby amended by mutual consent of both contracting parties, as follows, viz.: First: In lieu of \$6200.00 cash payment on March 13, 1912, that upon the receipt of \$300.00 cash on or before March 13, 1912, \$5900.00 being balance of the \$6200.00 cash payment, together with the interest on said \$5900.00 and on the \$22,000.00 from March 13/12 at 7% per annum, to be extended to June 13, 1912, on which date \$5900.00 and all accrued interest to be paid." Some additional conditions were stated affecting the notes, and the indorsement concluded with the following words: "All the items and terms mentioned and referred to in the within original option to obtain as therein written." Again, on June 13, 1912, the following indorsement was made and signed by the parties: "The foregoing amendment to option is hereby continued to December 1st, 1912, by mutual consent of both parties thereto in consideration of the receipt this day of \$1000.00 by the Compton Land Company; the cash payment of December 1, 1912, to be \$4900.00 and all interest accrued on the above mentioned \$1000.00 and \$4900.00 and on \$22,000.00 from March 13, 1912; the six semi-annual notes of equal amounts aggregating \$22,000.00 are to be dated December 1, 1912." A further indorsement, dated 11-25-12,

being one of assignment of the rights of the option-holder to the defendant H. S. Woolner, appeared. There was no contention, as shown by the testimony heard, that on December 1, 1912, the person in whose favor the option was issued, or his assignee, had made the payment required, and it was admitted that no money was paid, except that shown by the writing and the indorsements appearing as before mentioned. More than two months after the expiration of the last-mentioned date this action was filed. Defendant Woolner first asserted by his answer that certain encumbrances existed against the land which made it impossible for the plaintiff to comply with its agreement; and, secondly, set up a counter-claim contending that there should be returned to him all of the money paid under the agreement. It is sufficient to say that the findings of the trial court which determined that there was no encumbrance which would prevent full compliance being made by the plaintiff with its agreement, are supported by the evidence. As to whether the defendant was entitled to have returned any part of the money paid upon the written agreement, depends altogether upon the determination as to whether the contract as drawn constituted of itself or by the indorsements made thereon, an agreement of sale or a mere option to purchase. It will be noted that the proposed vendor sedulously asserted in the agreement that the instrument was an "option exclusively." It further appeared that it was contemplated that only after the six thousand two hundred dollars had been paid was the vendor to execute "a good and sufficient agreement for sale." The contract in its original form and without the indorsements, purported only to extend to Vaughan an option to have later executed in his favor an agreement of sale which would bind both parties. It is said in the agreement that in the event the payment of six thousand two hundred dollars was not made on or before the 14th of March, 1912, "then this contract to be void and of no effect and both parties released from their obligations herein." Quite plainly it appears that if Vaughan at the time the six thousand two hundred dollar payment became due had failed to pay and no extension had been granted to him, the vendor would not have had the right to sue Vaughan to recover that payment, or to compel him to purchase the property at the price and according to the terms set forth in the agreement. If the vendor had not

this right, then, as there was no mutuality of remedy, the contract is at once given the impression of being an option merely, the benefits of which Vaughan might or might not, at his election, take advantage of. The mere fact that the initial payment was to be applied upon the purchase price, does not change the condition of the contract in the respect just considered. Such was also the case in the contract before the court in *White v. Bank of Hanford*, 148 Cal. 552, [83 Pac. 698]; and see, also, *Briles v. Paulson*, 170 Cal. 196, [149 Pac. 169]. Neither can it be gathered from the indorsements made upon the contract, whereby it was extended upon the consideration of the payment, first, of three hundred dollars and then of one thousand dollars, that there was any intent upon the part of the parties to change the character of their contract relations. It was merely provided that the dates of payment should be changed, and that portion of the contract remained in force which postponed the execution of a formal agreement of sale until the time when the six thousand two hundred dollar payment, or the reduced amount thereof, should fall due. If the money paid was, and we so hold, the consideration upon which the option to purchase only rested, then upon the lapse of the time fixed by the contract and the extension indorsements, the vendor meanwhile holding itself ready to fulfill its obligations, the option-holder would have received all the consideration bargained for. He got what he paid for and there was nothing to be returned to him. It is even held where there have been considered contracts which admittedly constitute agreements to purchase and sell realty binding upon both parties, that the vendee in default may not recover payments made by him under his contract, although in that case the remedy of the vendor, where he chooses to be the actor in the litigation, is generally that of foreclosure. (*Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, [69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713].)

The foregoing propositions are the only ones which are properly presented by this appeal or which require or merit attention of the court. We think that the trial judge was correct in the findings and judgment as made.

The judgment is therefore affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 2106. Second Appellate District.—March 1, 1917.]

**THE PEOPLE ex rel. DAVID B. LYONS, Appellant, v.
THOMAS MCALLEER, Respondent.**

COUNTY OF LOS ANGELES—REGISTRAR OF VOTERS—UNAUTHORIZED TRANSFER OF DEPUTY COUNTY CLERK—FAILURE OF CIVIL SERVICE COMMISSION TO PRESCRIBE RULES.—Under the charter of the county of Los Angeles, which went into effect on June 2, 1913, the civil service commission of the city of Los Angeles is without jurisdiction to transfer a deputy county clerk to the office of registrar of voters, where the commission had not, as required by section 34, article IX, of such charter, prescribed rules under which it might make transfers from one position to a similar position in the same class or grade, and there existed no other provision in the charter empowering the board to make the transfer.

ID.—OFFICE OF REGISTRAR OF VOTERS—MANNER OF APPOINTMENT.—Under the provisions of section 14 of article IV of the charter of the county of Los Angeles, the registrar of voters of such county is an appointive officer, and the office not being in the unclassified civil service named in article IX, section 33, appointment to the office must, as required by subdivision 1, section 11, of article III, be made by the board of supervisors from the eligible civil service list, consisting of three persons certified by the commission as standing highest in accordance with the general rule prescribed by the commission for the creation of such list.

ID.—CHARACTER OF OFFICE—CHARTER.—The office of registrar of voters of the county of Los Angeles is, under the charter of that county, an independent office, as distinct and separate from that of county clerk as is that of auditor or recorder, and since it is specified as one of the offices to be filled by appointment to be made by the board of supervisors from the eligible civil service list, it cannot, under the pretense that it was of a like grade and class with that of deputy county clerk, be filled by the act of the civil service commission under the guise of transferring a deputy county clerk in charge of the registration department to such independent and distinct office.

APPEAL from a judgment of the Superior Court of Los Angeles County. Eugene P. McDaniel, Judge presiding.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, John Beardsley, A. B. Shaw, Jr., and David Evans, for Appellant.

W. J. Ford, Percy V. Hammon, and Oscar Lawler, for Respondent.

SHAW, J.—The subject of this proceeding, in the nature of *quo warranto* brought in the superior court of Los Angeles County at the relation of David B. Lyons, is the title to the office registrar of voters of Los Angeles County.

Upon the trial in the court below, judgment was entered declaring the respondent Thomas McAleer entitled to the office, and that the relator David B. Lyons had no right thereto, from which judgment the plaintiff has appealed.

The facts out of which the proceeding arose are as follows: Pursuant to the provisions of section 7½ of article XI of the constitution, the electors of the county of Los Angeles duly adopted a charter for the government of said county, which, upon being approved by the legislature and as provided therein, took effect on June 2, 1913. Among other offices created by the charter and which the board of supervisors was authorized to fill by appointment was that of "registrar of voters." While the charter, save as to services to be rendered in connection with petitions for the recall of officials as provided in article XI thereof, is silent as to the duties of the official holding such position, we may assume that they are identical with those which were imposed upon the county clerk by general laws, and for the performance of which such clerk was allowed a deputy in charge of the registration department at a salary of \$150 per month (Pol. Code, sec. 4230), which position, as such deputy in charge of said department, McAleer, as the duly appointed, qualified, and acting deputy, had held from the date of his appointment on June 2, 1911. By subdivision 1 of section 11 of the county charter, the board of supervisors is authorized to appoint the registrar of voters, the appointment of whom (since the incumbent does not fall within the unclassified service herein-after referred to) must, as provided by said section, be made from the eligible civil service list submitted to said board by the civil service board created by section 30 of article IX of the charter, which subdivision 1 of section 11 also provides that the board of supervisors shall by ordinance fix his compensation. Section 33 of the charter divides the civil service of the county into the unclassified and classified service, and provides that the classified service shall include all positions now existing or hereafter created, excepting certain positions mentioned as belonging to the unclassified service, which, however, does not include the registrar of voters, that being

included in the classified service. Section 34 of said article IX provides that the civil service commission, consisting of three members to be appointed by the board of supervisors (section 30), "shall prescribe, amend and enforce rules for the classified service, which shall have the force and effect of law," which rules, among other things designated in sixteen subheads, shall provide: "1. For the classification of all positions in the classified service. 2. For open, competitive examinations to test the relative fitness of applicants for such positions. 3. For public advertisement of all examinations. 4. For the creation of eligible lists upon which shall be entered the names of successful candidates in the order of their standing in examination. . . . 6. For the appointment of one of the three persons standing highest on the appropriate lists. . . . 10. For transfer from one position to a similar position in the same class and grade. . . . 11. For promotion based on competitive examination and records of efficiency, character, conduct and seniority. . . . An advancement in rank or an increase in salary beyond the limit fixed for the grade by the rules shall constitute promotion. Whenever practicable vacancies shall be filled by promotion. . . . 16. For the adoption and amendment of rules only after public notice and hearing." Followed by the provision that, "The commission shall adopt such other rules, not inconsistent with the foregoing provisions of this section, as may be necessary and proper for the enforcement of this article." Section 37 provides that, "All persons in the county or township service holding positions in the classified service as established by this article, at the time it takes effect, whether holding by election or by appointment, and who shall have been in such service for the six months next preceding shall hold their positions until discharged, reduced, promoted or transferred in accordance with the provisions of this article." Section 38 provides that, "The auditor shall not approve any salary or compensation for services to any person holding or performing the duties of a position in the classified service, unless the payroll or account for such salary or compensation shall bear the certificate of the commission that the persons named therein have been appointed or employed and are performing service in accordance with the provisions of this article and of the rules established thereunder." It is further provided by section 50, which relates to the recall of

officials and specifies certain duties in connection therewith to be performed by the registrar of voters, that "until such time as the board of supervisors shall appoint a registrar of voters under the provisions of this charter, the powers and duties by this section conferred upon the registrar of voters shall be exercised and performed by the county clerk." On June 2, 1913, the day the charter became operative, the board of supervisors by ordinance fixed the salary of the registrar of voters at \$150 per month.

No rules whatever were adopted by the commission until January 1, 1914. On October 15, 1913, the county clerk of Los Angeles County addressed a communication to the civil service commission, recommending that Mr. McAleer be transferred to the position of registrar of voters, which communication, on October 16, 1913, was transmitted to the board of supervisors, together with a letter from the civil service commission stating that "this commission holds that under the civil service provisions of the charter, it may authorize the transfer of Mr. McAleer upon recommendation of the board of supervisors, and that in the event the board fails to recommend the transfer, then the position should be filled by open competitive examination." On October 27th the board of supervisors made an order authorizing the transfer of McAleer from the position as deputy county clerk in charge of registration department to the office of registrar of voters, and on November 4, 1913, the civil service commission, as shown by its minutes, made an order as follows: "Upon the joint request of the county board of supervisors and county clerk Leland, the transfer of Thomas McAleer from service as registration clerk, in the office of the county clerk, to the office of registrar of voters, was authorized." It thus appears that, in the absence of rules which the commission was by section 34 to prescribe and enforce for the classified service, and without any competitive examination therefor, Thomas McAleer, who was a deputy county clerk in charge of the registration department, was by the civil service commission transferred therefrom to the newly created office of registrar of voters. The recommendation of the county clerk that such transfer be made is entitled to no weight whatsoever; neither did the order of the board of supervisors authorizing the making of the transfer confer any power upon the commission to make the same. We must therefore, in order to sustain the

action of the commission, look for some provision of the charter which empowered it to make the transfer. By subdivision 10 of section 34, the commission was not only authorized but required to prescribe rules under which it might make transfers from one position to a similar position in the same class and grade. Assuming, but not holding, that the office of registrar of voters created by the charter was in the same class and grade as that of deputy county clerk in charge of the registration department, nevertheless, until adopted, there was no rule having the force and effect of law under which such transfer could be made. The provision of the charter was not self-executing, but contemplated the adoption of a rule having the force and effect of law to make it operative, and the power to enact such legislation was delegated to the civil service commission. In other words, the charter, which may be termed the organic law of the county, conferred upon the civil service commission the power to enact a law for the transfers designated in subdivision 10 of section 34; but until such legislation, there was no law authorizing the commission to take any action in such cases. Counsel for respondent insist that the jurisdiction of the commission to make the transfer did not depend upon the adoption of such rule; that in making the transfer it had the same power to act in the absence of the rule as though it had been made. In support of this contention they direct our attention to section 3 of article XII of the charter of San Francisco, which provides: "The commissioners shall make rules to carry out the purposes of this article, and for examinations, appointments, promotions and removals, and in accordance with its provisions may from time to time make changes in the existing rules." In construing this provision (*Cook v. Civil Service Commission*, 160 Cal. 589, [117 Pac. 663]), the supreme court said: "The section of the charter requiring the adoption of general rules for examinations, etc., by the commissioners, expressed, not a mandatory, but a directory admonition. There is nothing in the language of the act which makes the adoption of such rules a jurisdictional prerequisite to the holding of examinations by the board. These rules were merely 'to carry out the purposes of this article,' i. e., those relating to civil service. The rules were to be a part of the scheme of testing the fitness of candidates for promotion, but the right to examine candidates

was not made to depend upon the adoption of these general rules. . . . The commissioners' failure to pass general rules, and the errors, if any, in establishing the possible percentages in the awarding of credits, were not matters of judicial fibre, and in nowise affected the jurisdiction of the commission." In that case, which was a proceeding in *certiorari*, the question involved was the power of the board to hold a competitive examination in the absence of general rules authorized by the section of the San Francisco charter. In the case at bar, no competitive examination was held; nor was there any observance of the civil service scheme adopted, which was clearly intended to prevent transfers or appointment to office, other than in accordance with rules which the commission in express terms was required to adopt. Moreover, the provision of the San Francisco charter which the supreme court was called upon to construe in the case referred to was almost identical with the provision in the Los Angeles charter which provides that "the commission (in its discretion) shall adopt such other rules, not inconsistent with the foregoing provisions of this section, as may be deemed necessary and proper for the enforcement of this article." The commission failed and neglected to obey the mandatory provision of section 34, whereby it was not only authorized but required to prescribe a general rule under and pursuant to which all transfers should be made. Until such rule was adopted, there was no law in the charter or elsewhere authorizing the purported transfer; hence the act of the civil service commission was without authority, arbitrary, and insufficient to vest in McAleer any right or title to the office. While it is true, as claimed by respondent, that the commission, under subdivision 1 of section 34, was authorized to make a rule providing for the classification of all positions in the classified service, it does not follow that said commission, by making the transfer on November 4, 1913, legally adjudged the position of deputy county clerk in charge of the registration department was in the same class and grade as that of registrar of voters, for the reason that, since the commission had adopted no rule for the classification of positions in the classified service, which includes the office of registrar of voters, there was no law under and pursuant to which the commission could determine said positions to be in the same class and grade. To sustain respondent's position would remove all

limitations upon the power of the commission to make transfers, and, in the absence of general rules for guidance, leave it free to act arbitrarily in each particular case, thus nullifying the purpose for which the civil service provision was adopted.

The registrar of voters, as we have seen, is an appointive county officer (section 14), and since it is not in the unclassified service named in section 33, the appointment to the office must, as required by the express provision of subdivision 1 of section 11, be made by the board of supervisors from the eligible civil service list, consisting of three persons certified by the commission as standing highest in accordance with a general rule prescribed by the commission for the creation of such eligible list. (Subdivision 4, section 34.) In our opinion, the office of registrar of voters was an independent office, as distinct and separate from that of county clerk as is that of auditor or recorder, and since it is specified as one of the offices to be filled by appointment to be made by the board of supervisors from the eligible list, it could not, under the pretense that it was of a like grade and class with that of deputy county clerk, be filled by act of the commission under the guise of transferring such deputy clerk to such independent and distinct office. To hold otherwise would violate the plain import of the language contained in the charter and be subversive of the purpose which the electors had in adopting the provision.

The claim of relator Lyons to the office is based upon the following proceedings: On November 20, 1914, pursuant to an order of the civil service commission, an examination was held in accordance with rules theretofore adopted for the purpose of filling the office of registrar of voters. As a result of this examination Lyons was rated highest and, with others, placed on the list of those eligible for appointment to said office. On January 6, 1915, the commission certified to the board of supervisors the names of Lyons and two other persons standing highest, as shown by said examination, any one of whom was eligible for appointment to the office, and on August 10, 1915, the board of supervisors duly appointed Lyons as registrar of voters. Upon receiving a certificate of his appointment to the office, he duly qualified as such official and demanded from McAleer, the incumbent, possession of the office, books, and equipment, with which demand McAleer

refused to comply. The action of the commission in holding the examination, certifying to the board of supervisors the list of eligibles for appointment, and the action of said board of supervisors in appointing Lyons, seems to have been had and taken in strict accordance with the provisions of the charter, from which we conclude that McAleer had no right or title to the office, and that David B. Lyons was entitled to the same. And since the facts upon which our conclusion is reached appear from the findings, the judgment in favor of McAleer is not only reversed, but upon the going down of the *remititur* the trial court is directed to enter judgment upon the findings in favor of David B. Lyons.

Conrey, P. J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 28, 1917, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 20, 1917.

[Civ. No. 1645. Third Appellate District.—March 1, 1917.]

COUNTY OF SACRAMENTO, Petitioner, *v.* JOHN S. CHAMBERS, as Controller, etc., Respondent.

COUNTIES—CLASSIFICATION—USE OF STATE MONEYS.—Counties are not municipal corporations or, strictly speaking, corporations of any kind, but are local subdivisions of the state, created by the sovereign power without the consent of the people who inhabit them, although they possess some corporate characteristics and may be within the inhibition of sections 22 and 31 of article IV of the constitution, against the drawing or appropriation of money from the state treasury for the benefit of a corporation or any institution not under the exclusive control and management of the state and against the making of any gift of such money to any individual or municipal or other corporation.

Id.—TUBERCULOSIS LAW—ACT CONSTITUTIONAL.—The act (Stats. 1915, p. 1530) providing for the establishment and maintenance of a bureau of tuberculosis under the direction of the state board of health and granting state aid to counties for the support and care of persons afflicted with tuberculosis, is not violative of article IV, section 22, of the constitution, providing that no money shall be

drawn or appropriated from the state treasury for the benefit of any corporation or institution not under the exclusive control and management of the state, or of article XI, section 18, providing that the legislature shall not delegate to a special commission the power to interfere with or supervise the affairs of counties, or of article IV, section 31, providing that the legislature shall not lend or authorize the lending of the credit of the state or of any county in aid of or to any person for the payment of any liabilities of any individual, etc.

APPLICATION for a Writ of Mandate originally made to the District Court of Appeal for the Third Appellate District to compel the State Controller to draw his warrant in favor of petitioner in payment of his claim arising under the state tuberculosis law.

The facts are stated in the opinion of the court.

Hugh B. Bradford, District Attorney, and Kemper B. Campbell, Attorney for State Board of Health, for Petitioner.

U. S. Webb, Attorney-General, and Robert T. McKisick, Deputy Attorney-General, for Respondent.

HART, J.—This is an original application for a writ of mandate to compel the respondent, as state controller, to draw his warrant in favor of the petitioner for the sum of \$2,299.30, in payment of the claim of said petitioner arising under an act of the legislature of 1915, entitled: "An act to provide for the establishment and maintenance of a bureau of tuberculosis under the direction of the state board of health; defining its powers and duties; providing for the granting of state aid to cities, counties, cities and counties and groups of counties for the support and care of persons afflicted with tuberculosis; making an appropriation therefor; and repealing certain acts of the legislature of the state of California." (Stats. 1915, p. 1530.)

The first section of said act provides: "The state board of health shall maintain a bureau of tuberculosis for the complete and proper registration of all tuberculosis persons within the state; for supervision over all hospitals, dispensaries, sanatoria, farm colonies, and other institutions for tuberculosis, both public and private; for advising officers of the state penal and charitable institutions regarding the

proper care of tuberculosis inmates, and for such educational and publicity work as may be necessary; for administration of the fund for state aid to cities, counties, cities and counties and groups of counties for the care of patients who are county charges in city, county, or city and county tuberculosis wards or hospitals or in tuberculosis wards and hospitals maintained by any group of counties, and for the performance of such other duties as may be assigned by the said board."

The second section provides that the state board of health shall appoint a director, who shall be duly qualified and trained in public health work. In addition to the administration of the bureau, under the supervision of the said state board, it is by said section made the duty of the director, "and he is hereby vested with full power," to inspect and investigate, and have access to all records and departments of all institutions, both public and private, where tuberculosis patients are treated. "He shall prepare annually for each institution a report of its rating on sanitary construction, enforcement of sanitary measures, adequate provision for medical and nursing attendance, provision for proper food, and such other matters of administration as may be designated. Administration of the fund for the care of patients who are county charges in city, county, and city and county tuberculosis wards and hospitals and the tuberculosis wards and hospitals maintained by any group of counties shall be based upon his reports and under the rules and regulations of the board."

Section 3 provides that any city, county, etc., establishing a tuberculosis ward or hospital shall receive from the state three dollars per week for each person in the active stages of tuberculosis, cared for therein at public expense, who is unable to pay for his support and who has no relatives legally liable and financially able to pay for his support and who has been a *bona fide* resident of such city, county, etc., for one year; provided, that the city, county, etc., shall not become entitled to receive such state aid unless the tuberculosis ward or hospital conforms to the regulations of and is approved by the state bureau of tuberculosis. "The medical superintendent of each hospital receiving state aid under this act shall render semi-annually to the state bureau of tuberculosis a report under oath showing, for the period covered by the report, (1) the number of patients in the active stages of

tuberculosis cared for therein at public expense, unable to pay for their own support and having no relatives legally liable and financially able to pay therefor, and (2) the number of weeks of treatment of each of such patients."

The refusal of the respondent to draw his warrant in favor of the petitioner for the amount named in the petition is based entirely upon the claim that said statute, in so far as it authorizes the payment of the sums specified therein to cities, counties, etc., for the purposes stated in the act, is in violation of sections 22 and 31 of article IV, and section 13 of article XI of the constitution. His position, more specifically stated, is that the maintenance and support and the control of county hospitals constitute duties and burdens which the law casts upon the supervisors and the taxpayers of counties, and that the expense necessary to be incurred in supporting such hospitals is a county charge, citing sections 4223, 4041, subdivision 7, and 4307 of the Political Code. It is hence argued that, since county hospitals are not under the exclusive management and control of the state as state institutions, the proposed payment of money drawn from the treasury to counties, etc., for the purpose mentioned in the said act, is in contravention of section 22 of article IV of the constitution; 2. That counties are municipal corporations and that, therefore, the payment of such moneys to counties would involve a gift of the same, contrary to section 31 of said article; 3. That the act, in violation of section 13 of article XI of the constitution, attempts to delegate to the bureau of tuberculosis or the state board of health the power to control and supervise and thus interfere with the affairs of a county, to the extent to which the bureau or board may require the tuberculosis ward or hospital of such county to conform, in the management thereof, to the regulations established by said bureau, and to make reports thereto, as prescribed by the act.

Referring first to one of the several points made by the petitioner in support of the claim that the act in question impinges upon none of the provisions of the constitution within the inhibitions of which the respondent insists the act in question falls, it may be remarked: That it is well settled that counties are not municipal corporations or, strictly speaking, corporations of any kind. They are obviously lacking in the essentials which chiefly characterize and dis-

tinguish municipal corporations, and it has often been said that they do not come within the latter class of corporations. It is true that both municipal corporations and counties are governmental agencies, but the manner and source of their creation and the purposes, respectively, to subserve which they are brought into existence and activity are entirely at variance. "Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience. On the other hand, counties are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) is asked for, or at least assented to, by the people it embraces; and the latter organization (counties) is superimposed by a sovereign and paramount authority. . . . With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." (1 Dillon on Municipal Corporations, 5th ed., sec. 35.) Counties, however, possess some corporate characteristics. Like all involuntary political or governmental subdivisions of the state, they are classed as *quasi* corporations. But whatever may be their proper classification, we are not prepared to say that counties are not within the inhibitions of sections 22 and 31 of article IV of the constitution, against the drawing or appropriation of money from the state treasury for the benefit of a corporation or any institution not under the exclusive control and management of the state and against the making of any gift of such money to any individual, municipal, or other corporation of whatsoever kind or character. It is undoubtedly true that the design of the sections of the constitution invoked against the act in question was to prevent the appropriation of the moneys of the state for any purpose other than that which pertains to the state, and that an appropriation by the legislature of money from the state treasury for a purpose wholly foreign to any of the essential functions of the state government would clearly and unquestionably amount to a gift within the plain meaning and intent of section 31 of article IV. (*Stevenson v. Colgan*, 91

Cal. 649, 651, [25 Am. St. Rep. 230, 14 L. R. A. 459, 27 Pac. 1089]; *Bourn v. Hart*, 93 Cal. 321, [27 Am. St. Rep. 203, 15 L. R. A. 431, 28 Pac. 951].)

But we do not hesitate to express the opinion that the provision of the act in question authorizing the payment to counties of the sums to be used for the purpose therein specified is not in contravention of the sections of the constitution just adverted to. Nor are we impressed with the argument that said provision of said act is obnoxious to the objection that it offends section 13 of article XI of the constitution, in that it involves an attempt by the legislature to delegate to "a special commission," etc., the power to interfere with or supervise the affairs of counties or to "perform any municipal function whatever."

It has never been, nor will it ever be, questioned that, among the first or primary duties devolving upon a state is that of providing suitable means and measures for the proper care and treatment, at the public expense, of the indigent sick, having no relatives legally liable for their care, support, and treatment, those who are infirm and helpless from the ravages of advancing years and without means of their own or relatives upon whom the law places responsibility for their care and support, and the insane, likewise situated as to means necessary for their care, support, and safekeeping. (Cooley on Taxation, p. 204.) Nor can it for a moment be doubted that it is the duty of the state to take all necessary steps for the promotion of the health and comfort of its inhabitants and to make such regulations as may be conceived to be essential to the protection of the state and the people thereof, so far as such result may be attained, against the visitations and prevalence of deadly epidemical and endemic diseases, and to take and prosecute such health and sanitary steps and measures as will result in stamping them out, or, by recognized methods of scientific treatment, reducing to the lowest possible minimum the percentage of fatalities following therefrom. These are duties which the state owes to its inhabitants for the protection, promotion, and the preservation of their general happiness and welfare; and, as is true of the duty of the state in the matter of taking proper care of the impecunious or indigent who are afflicted with disease and who have no means for caring for themselves or relatives legally responsible for such care, they are duties

which the state may perform in the exercise of its sovereignty, even in the absence of direct constitutional authority therefor—indeed, duties which it may discharge under its inherent power of police.

But we do not understand that it is claimed by the respondent that the duties to which we refer do not rest upon the state or that the state is without the power to execute them. In fact, as we understand the position of the respondent, it is not claimed by him that the sections of the constitution invoked against the validity of the legislation involved in this dispute were intended to have the effect of prohibiting the state from performing the duty or exercising the power of which we have been speaking. In such a case, these questions may arise, however: Whether the state has shifted the burden of those duties upon the counties, and, if not, whether, in the exercise of the power whereby it may perform those duties, the state has adopted a mode or method of doing so which is not discountenanced by any of the provisions of the constitution. In this case, the fundamental proposition upon which the respondent builds up his argument against the constitutional propriety of that provision of the act in question which authorizes the payment of certain sums to the counties for the purpose stated therein is that the state has made it the duty of counties to maintain hospitals for the care, support, and treatment of the indigent sick, and that therefore the burden of supporting such hospitals is upon the counties and not upon the state.

The constitution nowhere places the burden of maintaining, supporting, caring for, and treating the indigent sick upon the counties of the state. The legislature, however, in the exercise of its duty and power to establish a system of county governments (section 4, article XI, constitution), has, in fixing and enumerating the powers of boards of supervisors of the counties, authorized said boards to establish and maintain county hospitals, prescribe rules for the government and management thereof, and appoint county physicians and the necessary officers and employees thereof, who shall hold office during the pleasure of the board (Pol. Code, sec. 4223); to build or rebuild, furnish or refurnish hospitals and almshouses (Pol. Code, sec. 4041, subd. 7); and has further provided that the necessary expenses incurred in the support of the county hospitals, almshouses, and the indigent sick and

otherwise dependent poor, whose support is chargeable to the county, constitute county charges (Pol. Code, sec. 4307, subd. 7).

As stated, upon the foregoing provisions of the Political Code the argument is erected that, the state having transferred to counties the duty and burden of maintaining hospitals for the care, support, and treatment of the indigent sick, an appropriation of any moneys from the state treasury for the support of such afflicted persons amounts to a gift, and is therefore in violation of the constitution, and that the statute in question not only runs up against that inhibition of the constitution, but violates the other sections of the organic law above referred to for the reasons heretofore stated.

There is no doubt that the legislature, by the legislation above referred to, intended to and did transfer from its own shoulders and so placed upon the counties the duty and burden of caring for, supporting, and treating the classes of persons mentioned. But this does not mean that the state has thus forever surrendered all control over those matters or the right itself to exercise full and complete and exclusive jurisdiction and control over hospitals for the indigent sick and helpless paupers. As before stated, the constitution does not require this burden to be borne by the counties. The state may so transfer it to counties, however, in the exercise of its sovereignty. As we have seen, counties are mere agencies of the state, the functions of whose organization are, to the extent of the territorial limits of their geographical divisions, concerned with the administration of the general governmental policy of the state, "and are, in fact, but a branch of the general administration of that policy." All the people of the state, while not directly interested in the administration of the affairs of municipal corporations of which they are not members, are so interested in the administration of the governmental affairs of a county, whether they reside or own property therein or not, because, as stated, such administration involves, to the extent of the geographical limits of a county, the administration of the affairs and policy of the state. The state may, through its legislature, and in the exercise of its sovereign power and will, in all cases where the people themselves have not restricted or qualified such exercise of that power, apportion and delegate to the counties any of the functions which belong to it. On the other hand, the

state may take back and itself resume the exercise of certain functions which it had delegated to those local agencies; and, in some cases, particularly those having reference to the state's police power, we know of no reason, constitutional or otherwise, why the state and the counties may not act conjointly and synchronously in carrying out the policies of the former. Indeed, an analogy to the latter situation may be found in the matter of the regulation by the state of the right to pursue and kill wild birds and animals. By an act of the legislature of 1909 (Stats. 1909, p. 663), the authority to issue licenses for such hunting and killing is vested not only in the state board of fish commissioners, but also in the county clerks of the various counties of the state. The act requires the last-named officials, upon application therefor, to issue such licenses, to receive the fees therefor, to account for the same to the state controller every three months, and pay all sums so received into the state treasury, they (the clerks) to receive as their compensation for the services so performed out of the state "game preservation fund" ten per cent of the amounts accounted for. (*County of Sacramento v. Pfund*, 165 Cal. 84, [130 Pac. 1041].) This so-called "game law" does not, it is true, make the collection of the licenses therein provided for a function of the county organization. But it is very clear that it does employ a part of that organization's machinery for carrying out its policy with respect to a branch of its own functions, and we doubt not that it could have devolved that duty upon the counties themselves, designating the particular officers thereof to discharge it, and have provided that the compensation for such service should be paid into the treasury of the county from the state fund mentioned in that act, in which case it would not be contended or held, as it has never been contended or held under the provisions of the present game law, that the payment for the service so performed for the state out of moneys in the state treasury would involve a gift of such moneys within the inhibition of section 31 of article IV of the constitution or an appropriation or the drawing of money from said treasury in violation of section 22 of said article. The game law, however, as before suggested, stands as a concrete example of the proposition above explained, viz.: That the true purpose of county government organizations is to perform functions which belong to the state itself, and that the latter may employ them, either jointly

with itself or alone, as instrumentalities in aid of the administration or the carrying out of its own general governmental functions and policy.

The act in question does not, it seems to us, go any further than the act regulating the right to pursue and kill wild game and animals, above referred to. It does not purport to nor does it involve an appropriation of money for the support or in aid of the support of county hospitals. As a matter of fact, there is no such institution as a county hospital as a separate entity. As has been shown, the legislature has authorized or empowered the supervisors of counties to establish and maintain, at the expense of taxpayers of counties, hospitals at which the indigent sick and infirm, otherwise eligible to the public bounty in that particular, may receive proper care, support, and medical treatment. The power to maintain such establishments, like that whereby the counties may build and maintain public roads and highways, or administer public justice, is only a part of the general scheme established by the legislature whereby those political subdivisions are required to exercise and perform certain of the functions of the state which the latter, for convenience and economy, has elected to commit to them. As above declared, the state may, if it so elects, assume entire control of the matter of caring for and supporting and administering aid to the classes of persons for whose benefit county hospitals are established and maintained. It has the right and the power to establish and maintain, under its own exclusive control and management, hospitals for such purposes, and so entirely relieve counties of that duty and burden. And, having the right and the power to take upon itself entire responsibility for the support and the treatment of all such persons, it has the undoubtedly right and power to take exclusive or only partial control and assume corresponding liability for the care, treatment, and support of a portion or a certain class of such persons, or those only who are afflicted with a particular kind of malady. By establishing state hospitals, under its exclusive control and management, where the insane and feeble-minded are maintained and given medical treatment, the state has exercised this very right and power. And it is in effect what it has done in this case.

Tuberculosis is a deadly disease, fatal almost in every instance, unless, in its earliest stages, its progress is arrested

and the tubercle bacilli are destroyed. That it is a contagious disease or one that is by contact transmissible from a victim of the malady to one not so afflicted, is a thoroughly established scientific fact. By health statistics and data gathered and published by the public health department of the state government, it has been shown that over one-seventh of all the deaths in California, prior to the passage and enforcement of the law here under attack, were caused by this dread and justly dreaded disease, and that, down to the time mentioned, the ratio of deaths from tuberculosis was constantly increasing. Incidentally, it may be observed that, according to verified and authentic statistics gathered and prepared by the same official authority, there has been in California a marked and readily noticeable decrease in deaths from said cause since the passage and enforcement of this statute.

There are still in California, however, as we learn from the official reports of the said health department, large numbers of persons suffering from this deadly disease, mostly in the form of attacks upon the pulmonary organs, very many of whom are without financial means to pay for their own support and medical treatment and without relatives legally liable or financially able to give them support and the care and treatment indispensable in such cases. The existence of such conditions is obviously a positive menace to the health of the inhabitants of the state.

But it has been demonstrated that by special scientific treatment, under favorable sanitary and general health conditions, tuberculosis, when not advanced to its final stages, may be cured; but that, unless such conditions are established and uniformly maintained, the difficulty of securing restoration of the patient, however able, persistent, and scientific may be the medical treatment, becomes in most cases insuperable.

Considering and finding all these facts, as we must assume that it did, the legislature has adjudged that drastic or at least more than the usual or ordinary precautions taken to guard and protect and preserve the public health should be provided for and taken against the spread of this well-nigh implacable destroyer of human life. That body conceived, as certainly there was real, substantial, and alarming occasion for conceiving, that measures should be adopted requiring the subjection of the disease to the strictest surveillance, to the

end that spread of the disease by the indiscriminate inter-communication of its victims with the public at large might be prevented, and to special medical treatment and scientific nursing, under such scientifically arranged and maintained conditions as the latest and most scientifically conducted investigations and experiments have demonstrated to be all-essential to successful treatment of the malady. The manifest purpose of the statute is therefore twofold: 1. To succor those indigents who are afflicted with tuberculosis and who have no relatives legally liable for their support, maintenance, and treatment, or, if legally liable, having no financial means to discharge the liability; 2. To prevent the spread of the disease.

The state, to attain these ends, has, by the statute in question, and in the exercise of its sovereignty—indeed, in the exercise of its police power—assumed the right and authority to control the matter of the care and treatment of those indigents who are legally entitled to be cared for and treated at public expense and who are afflicted with tuberculosis; but, in the place of erecting and maintaining hospitals or sanatoria for that purpose in various parts of the state, which it would have a right to do, it has employed the counties—its agents in the administration of certain of its functions of government—as instrumentalities for or aids in controlling and managing that branch of its governmental duties and policy. That this is the true analysis and exposition of the object and intent of the statute in controversy here is evidenced by the provisions that, as conditions to the payment to the counties of the money therein provided for, the latter must establish tuberculosis wards or hospitals in compliance with regulations established by the state bureau of tuberculosis, that the medical superintendent of such wards or hospitals must render, semi-annually, to the said state bureau, a report under oath, showing the number of patients in the active stages of tuberculosis legitimately cared for therein at public expense and the number of weeks of treatment of each such patients, and that the director of the state bureau may have full power to inspect and investigate, and have access to all records and departments of all institutions, both public and private, where tuberculosis patients are treated, and must prepare annually for each institution a report of its rating on sanitary construction, enforcement of sanitary measures, adequate provision for medical and nursing attendance, provision

for food, and such matters of administration as may be designated, etc. The latter provision—giving the state's agents the authority to inspect and investigate private tuberculosis hospitals—is indicative of the importance attached by the state to the exercise of special care in the matter of the treatment of tuberculosis and the maintenance of the most favorable sanitary conditions and surroundings wherever victims of that disease may be cared for and treated. The state undoubtedly has the right, under its police power, to adopt sanitary or other appropriate regulations, applicable to the whole state and to private as well as to public tuberculosis sanatoria, looking to the stamping out of the disease and the prevention of its increase, and thus to the protection of the public health. With respect to county tuberculosis wards or hospitals, it proposes by the law in question to do no more than this. In authorizing the payment by the state of the sum named in the act to counties maintaining such wards or hospitals according to regulations formulated and promulgated by its health department, the legislature did not intend, nor was it the object of the act, to appropriate the state's money to or for the benefit of counties, but only to facilitate the proper execution of its scheme to control in part or itself supervise the matter of the treatment of indigent tuberculosis patients, legally entitled to be taken care of at public expense. Obviously, the counties, to which these moneys are authorized to be paid, are, as to such money, mere trustees of an express trust, with absolutely no authority or right to divert the use of the same to any other than the purpose or object for which it has been expressly appropriated by the state. As repeatedly herein declared, we can perceive no sound reason for holding that it is not within the competence of the state to enter into such an arrangement with the counties under its broad and comprehensive and essential sovereign power—that power, unhampered by constitutional restrictions, except, perhaps, as to the mode and manner of its exercise, under which the state is not only authorized, but it is its duty to make and enforce all such reasonable rules and regulations as may be necessary and conducive to the promotion and preservation of the general health, happiness, and welfare of its inhabitants. Thus it is very clear that, in enacting the law with which we are here concerned, and thereby making an appropriation of the state's money for the proper carrying out of

the plan therein set forth for the care and suppression of a dangerous contagious disease, the state has not transcended but has remained within its rights as a sovereign commonwealth. Thus it does not make a gift of the public money in contravention of the thirty-first section of article IV of the constitution, nor appropriate the money of the state to the use or benefit of the corporations or associations or institutions specified in section 22 of said article. Nor, under our view as above set forth as to the nature of the power under which the state has proceeded in the enactment of the law in question, should it be necessary to suggest that the provision of the last-named section of article IV of the constitution expressly authorizing the state to grant aid to institutions conducted for the support and maintenance of certain classes of persons (minor orphans, half-orphans, etc.), even when viewed by the light of the rule of construction, *expressio unius est exclusio alterius*, does not preclude the state from the exercise of the right to apply its police power on all proper and appropriate occasions, and to pass laws, such as the one before us, whose purpose is to protect the lives, health, and general happiness of its inhabitants. And it is equally patent, for reasons already given, that the act does not authorize the state bureau of tuberculosis or the state board of health to interfere with or supervise counties, their property or affairs. As stated, the supervisory control exercised by the state under the act is over the tuberculosis patients in the hospitals of those counties conforming in their treatment of those cases to the regulations of said state bureau.

It is conceded that the petitioner maintains a tuberculosis ward in connection with its county hospital conforming in all particulars to the rules established by the state bureau of tuberculosis for the regulation thereof.

In accordance with the foregoing views, the demurrer interposed by the respondent to the petition is hereby overruled, and a writ of mandate is hereby ordered to issue out of this court directed to said respondent, commanding him to issue to and in behalf of the petitioner his warrant for the amount named in the petition.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1933. First Appellate District.—March 3, 1917.]

ZANONA MATCHETTE et al., Respondents, v. CALIFORNIA FRUIT CANNERS ASSOCIATION (a Corporation), Appellant.

MASTER AND SERVANT—SAFE PLACE TO WORK—CHOICE OF DANGEROUS WAY—CONTRIBUTORY NEGLIGENCE.—The duty of an employer to furnish an employee with a reasonably safe place to work is fulfilled when he exercises ordinary care for that purpose, and when a safe way has been provided, and another and dangerous way exists, if the employee chooses to take the dangerous way and is injured, he is guilty of contributory negligence as a matter of law.

ID.—DEATH OF RAILROAD BRAKEMAN—SELECTION OF PLACE OF OBVIOUS DANGER—CONTRIBUTORY NEGLIGENCE.—In an action for the death of a brakeman killed while switching cars in the yards of a canning company, the deceased is properly held guilty of contributory negligence, as a matter of law, where it is shown that he was an experienced brakeman, and that he, in the performance of his duty, had free choice of several positions, and selected one of obvious danger.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Thomas, Beedy & Lanagan, for Appellant.

Preston & Preston, and Barrett & Thomas, for Respondents.

KERRIGAN, J.—Charles C. Matchette, a brakeman in the employ of the harbor commissioners of the state of California on its belt line railroad in the city and county of San Francisco, met his death while in the performance of his duties as a member of a switching crew on the premises of the defendant, the California Fruit Canners Association. This action was brought by his widow and minor daughter to recover damages for his death, which is alleged to have been caused by the negligence of the defendant. The jury rendered a verdict in favor of the plaintiffs and against the defendant for the sum of five thousand dollars, and from the judgment and from an order denying a new trial the defendant appeals.

The first contention of the appellant is that the evidence fails to establish that any duty owed to the deceased by the appellant was left unperformed, or that it was guilty of any negligence whatever, but that, on the contrary, the evidence affirmatively shows that the death of Matchette resulted from his own negligence. From the correctness of this contention we see no escape.

The record discloses the following facts: The defendant at the time of the injury complained of owned and maintained certain buildings situated in San Francisco, which it used in the operation of its business of canning fruit and for warehouse purposes. Between these buildings was a space of some seventy-two feet or thereabouts upon which were constructed two spur tracks from the belt line railroad owned and operated by the state of California. These spur tracks were standard gauge, and their length on defendant's property was approximately 210 feet. At the point where these tracks entered the defendant's property they were built on a curve, the curve continuing a distance of some 120 feet, from which point the tracks ran straight for a like distance upon said property. Parallel to the track throughout its entire length and on the westerly side of the cannery building there had been erected a platform, varying in width from the point where the track was straight to the place of the accident, and the edge of which was about four feet eight inches from the outer rail of the easterly spur track. The tracks were laid upon a trestle about fourteen feet high, which rested upon the basement of the building, and the platform was about three feet six or seven inches above the level of the track. On the morning of February 23, 1911, the day of the accident, the switching crew of which deceased was a member had switched one car on to the westerly spur track on defendant's premises, and then pulled their train back into Beach Street, which bounds the south side of defendant's plant, and switched a large box-car loaded with cans upon the easterly spur track. The switching equipment of the railroad consisted of an engine and a flat-car called a trailer. The crew was composed of the engineer and fireman, two switchmen, and a foreman. The deceased was one of the switchmen, and it was his duty on this occasion to spot the car that was being delivered, that is, to put it at a place on defendant's spur

track indicated by the foreman. When the train which caused the accident was being backed in it consisted of an engine, next the trailer, and the box-car that was being delivered. The trailer had a running-board at one end, upon which the other switchman—Conway, by name—took a position where he could receive and transmit to the fireman or engineer the signals given by the deceased. In the performance of his duties deceased took a position against the platform before mentioned, and as the train came in over the easterly spur track and swung on the curve the middle of the large box-car struck him and pressed him against the edge of the platform, causing his death. The evidence conclusively shows that the deceased had been in the railroad business for a number of years and was an experienced brakeman; that at the time of the accident he had been employed on the belt line road for several months as a member of the switching crew, and had been upon the defendant's premises many times before, and that he had on former occasions been accustomed to deliver large box-cars, such as the one that crushed him, upon this identical spur. The evidence further shows that the position which the deceased took was not necessary for the performance of his duties. The engine was in such a position that he could not signal directly to the engine crew, and it was his business only to instruct his fellow-switchman, who was on the trailer and who in turn would pass on the signal to the engine crew. There was no object to be served by his being upon the ground, the chief purpose of a switchman taking such a position being to couple or uncouple cars, or to give signals directly to the engine crew or throw switches—none of which acts were required of the deceased at this time, Conway being there for that purpose. The duty of deceased was merely to spot the car. In the performance of that duty he had free choice of several positions where he could have stood. He could have stood upon the platform, or he could have signaled from the side or top of the car, or he could have stood between the tracks.

Under these circumstances it is argued by the appellant that the deceased selected a place of obvious danger to perform his duties; that he knew, or ought to have known, that while a space of less than five feet between the outer rail and the platform on a curved track might leave room enough in the

case of a flat-car, that when a large car with its additional overhang such as caused his death was being switched in it was impossible for a man to stand there and avoid being struck by the car.

The duty of an employer to furnish an employee with a reasonably safe place to work is fulfilled when he exercises ordinary care for that purpose. Deceased was properly upon defendant's premises under an implied invitation. It was the defendant's duty to use reasonable care in providing a reasonably safe place for decedent to work, and, so far as the evidence shows, it fully discharged that duty. Deceased was an employee of the belt line railroad, and under the control of his superiors. The appellant could not instruct him as to the manner in which he should do his work. The deceased had assisted in bringing up the car which crushed him, knew its dimensions, and was an experienced brakeman, and he had a free choice as to where he should stand to spot from, and he chose a place of obvious danger. The location by defendant of the permanent structures necessary and convenient to accommodate its business near the tracks did not of itself constitute a danger; and even assuming that it did, it was obvious to the deceased, who, as we have said, was an experienced railroad man. The recent case of *Hontz v. San Pedro etc. R. R. Co.*, 173 Cal. 750, [161 Pac. 971], is in our opinion on all-fours with the case at bar. There the deceased was an experienced brakeman, and while a member of a switching crew engaged in moving cars in the lumber-yard of the defendant company was killed. Over a spur track in the lumber-yard there was a drawbridge which was raised to an upright position when switching was in progress. At times when raised the drawbridge sagged and leaned a trifle over a pit. This fact constituted no peril when flat-cars only were being handled, but it brought the bridge close to the side of box-cars. The bridge at the time of the accident was raised, and it leaned slightly toward the track. Decedent knew the position of the bridge, but for some unexplained reason in broad daylight, and without any necessity for so doing, he started to climb the ladder on the side of a moving box-car, and before reaching the top came into collision with the bridge and was killed. Mr. Justice Henshaw, in delivering the opinion of the court, said: "It is a universal principle that

when a safe way has been provided for an employee for the performance of an act, and another and dangerous way exists, if the employee chooses to take the dangerous way and is injured, he is guilty of contributory negligence as a matter of law."

It is argued by plaintiffs, however, that the questions of negligence and contributory negligence were for the jury; and that as those questions were resolved in plaintiffs' favor, this court should not disturb the verdict and the judgment based thereon. The case last cited effectively disposes of this contention also, for it is there said: "But if in cases such as this it is to be said that the question of contributory negligence is one of fact, it is extremely difficult to conceive of a case where it could be one of law." This statement of the law is applicable with equal force to the present case, for the facts and conditions upon which the question arises are identical. Here, although the distance between a car of ordinary size and the platform was not great, still it was perhaps sufficient for a brakeman using great care to stand there, but when large cars were switched in he could not do so without being struck; and, as before stated, the deceased was familiar with the premises, experienced, and had switched in like cars before, at which times he spotted from other positions. The entire evidence thus shows conclusively that the deceased was killed through his own negligence.

Untenable, also, is the contention of the plaintiffs that the defendant created a trap by failing to comply with the terms of a contract it had entered into with the Southern Pacific Railroad Company, under which the track was built, which in part provided that defendant was not to erect or maintain a platform nearer to the track than four feet eight inches. The rights of the parties hereto, as the trial court correctly instructed the jury, are in no manner measured by or dependent upon such contract. The obvious purpose of the provision in that contract was to leave a space that would accommodate large cars; and even if the provision had been complied with, the space would have been increased but a few inches, and the danger, for aught the evidence shows, would have been equally great, because any person who stood between the car and the platform when large cars were switched in was certain in any case to be struck.

In view of the conclusion we have thus reached it becomes unnecessary to notice the question of the proximate cause of the injury and further questions presented by the briefs.

The judgment and order are reversed.

Lennon, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 2, 1917, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 30, 1917.

[Crim. No. 531. Second Appellate District.—March 8, 1917.]

In the Matter of the Application of F. L. SMITH for a Writ of Habeas Corpus.

~~MUNICIPAL ORDINANCE—LICENSING OF MOTOR VEHICLES—USING STREETS FOR CARRIAGE OF PASSENGERS BETWEEN OUTSIDE POINTS.~~—A provision of an ordinance of a city of the sixth class making it unlawful, without first obtaining a license so to do, for any person to operate or carry on the business of operating any auto bus or motor vehicle over the streets of the city in carrying passengers for hire from one point to another, both of which points are outside the city boundaries, is invalid, as being in excess of the authority given to cities of the sixth class by subdivision 10 of section 862 of the charter for cities of the sixth class to license for the purpose of revenue and regulation every kind of business transacted and carried on in the city.

APPLICATION for a Writ of Habeas Corpus originally made to the District Court of Appeal for the Second Appellate District.

The facts are stated in the opinion of the court.

C. E. McDowell, for Petitioner.

Hartley Shaw, for Respondent.

SHAW, J.—An ordinance of the city of Tropico, which is a city of the sixth class, among other things, contained a

provision in effect making it unlawful, without first obtaining a license so to do, for any person to operate or carry on the business of operating any auto bus or motor vehicle over the streets of said city in carrying passengers for hire from one point to another, both of which points are outside the boundaries thereof. Upon a complaint charging petitioner with the violation of this ordinance, in that on November 21, 1916, he did "unlawfully operate a motor vehicle engaged in the business of carrying passengers for hire, which said motor vehicle was then and there operated and run over a particular route and between particular points, to wit: between the city of Bakersfield and the city of Los Angeles, through the city of Tropico and over San Fernando boulevard, a public street in said city, without first paying a license fee and obtaining a license therefor from said city of Tropico, contrary to the provisions of ordinance No. 119 of said city," a warrant was issued upon which he was arrested and held in custody by the city marshal.

Petitioner contends that the provision of said ordinance with the violation of which he is charged is invalid for a number of reasons, chief among which is the claim that a city of the sixth class is not vested with authority to enact an ordinance imposing a tax by license or otherwise upon motor vehicles conducting the business of transporting passengers from Los Angeles to Bakersfield over public highways a small part of which extend through the city of Tropico, where, *as here conceded*, no stops are made for the purpose of either taking on or discharging passengers in such city, nor any soliciting of business had therein. While under its police power such city may adopt and compel the observance of all reasonable measures intended for the regulation of traffic over the streets by all persons operating motor vehicles thereon, its sole power to levy a tax of this character is found in subdivision 10, section 862, of the charter for cities of the sixth class (Deering's Gen. Laws, ed. 1915, p. 1123), which provides that the board of trustees of said city shall have power "to license, for the purpose of revenue and regulation, all and every kind of business authorized by law and transacted and carried on in such city or town, and all shows, exhibitions, and lawful games carried on therein; to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise." Under this

provision the power of the city to impose a license upon *a business* is clearly limited to that only which is "*transacted and carried on in such city.*" That by virtue of this section the city of Tropico may require persons, companies, or corporations who *therein* conduct the *business* of transporting passengers for hire to be licensed, admits of no question. It is the occupation, however, not an act which is merely incidental thereto, which is subject to the tax. (*Merritt v. State*, 19 Tex. App. 435; *Weil v. State*, 52 Ala. 19; *Merced County v. Helm*, 102 Cal. 159, [36 Pac. 399].) Business is defined as that which occupies the time, attention, or labor of men for the purpose of profit or improvement. (*Trustees of Columbia College v. Lynch*, 47 How. Pr. (N. Y.) 273.) It may be said to embrace all things necessary to be done to fully accomplish the purpose implied by the undertaking. The business conducted by petitioner, as alleged in violation of the ordinance, is that of transporting passengers for hire, not in the city, but between termini both of which are outside thereof, incidental to, connected with, and as a part of which a number of acts other than transportation, such as soliciting business, taking on and discharging passengers, collecting fares, and caring for their welfare en route, are necessary to be performed. The transportation of the passengers over any particular part of the public highway is one of the incidents of the business, but it no more constitutes the business than does the collection of their fares. Hence, it cannot be said that the carrying of passengers for hire from Los Angeles to Bakersfield by means of a motor vehicle operated over the public highway, a part of which extends through Tropico, where no stops are made, nor any of the incidental acts of such transportation performed other than traveling along the streets, constitutes a business "*transacted and carried on in such city.*" Adopting the contrary view urged by respondent, the conclusion must logically follow that a physician, grocer, plumber,—indeed, everyone engaged in a professional calling or business in one city, having occasion to make a professional call or deliver goods to a purchaser, to do which required him to travel upon the highways through other cities, could under a like provision of the ordinance to that here involved be subjected to a tax in the guise of a license levied upon the theory that such use of the streets constituted "*a business transacted and carried on*" in the

different cities through which he passed. While the use of the streets may be regulated, the city has no power to convert them into toll roads and thus exact tribute from those who in the conduct of business elsewhere have occasion to use them solely as highways.

For the reasons given, the provision of the ordinance in question for the violation of which petitioner is deprived of his liberty is invalid. It is therefore ordered that he be discharged from the custody of the city marshal.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1660. Second Appellate District.—March 8, 1917.]

BENJAMIN WEST, Respondent, v. JESSE A. LINNEY AND COMPANY, a Copartnership, et al., Appellants.

NEGLIGENCE—INJURY TO PAINTER—FALL OF SCAFFOLD—SUFFICIENCY OF EVIDENCE.—In an action for damages for personal injuries sustained by a painter from the fall of the scaffold upon which he was working, evidence that it was possible for the employers of the plaintiff to have secured the scaffold against slipping of the shingles to which it was attached by fastening a rope to the hooks and tying it to a chimney on the top of the building, is sufficient to sustain the finding that the defendants were negligent in not providing plaintiff a safe place to work.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Louis W. Myers, Judge.

The facts are stated in the opinion of the court.

Robt. T. Linney, and Ralph W. Schoonover, for Appellants.

Harriman, Ryckman & Tuttle, for Respondent.

CONREY, P. J.—In this action it was alleged by the plaintiff that he was employed by the defendants as a house painter upon a certain house in the city of Los Angeles; that while working in the course of that employment upon a

scaffold supplied and erected by defendants and suspended by ropes and hooks from the building, the scaffold suddenly and without warning and through the negligence of the defendants, fell and precipitated plaintiff to the ground below whereby he received the described injuries. It was pleaded that the negligence of the defendants consisted in failure to provide plaintiff a secure and sufficient scaffold upon which to work, and proper and sufficient supports for said scaffold. Defendants appeal from the judgment and from an order denying their motion for a new trial.

It is conceded that the ropes, hooks, jacks, and platform constituting the scaffold were supplied by the defendants to the plaintiff and two other workmen who were co-operating with him as fellow-workmen in painting the house. It was also shown without conflict in the evidence that the scaffold fell suddenly and without warning, and thereby the plaintiff received his injuries. The scaffold was erected by workmen of the defendants who put the materials in place and swung the platform into the position where it was when it fell. It was clearly shown by the evidence, and is not disputed, that the scaffold was of a kind commonly used and well approved in the painting business, and that the particular materials were superior of their kind and in first-class condition. The method of erecting the scaffold was as follows: The ropes were hung from hooks which were fastened to roof jacks which rested upon the shingles of the roof. The upper end of each jack was thrust under an upper course of shingles, and the jacks were prevented from slipping by certain rows of screws the points of which were arranged so as to catch upon the shingles of the roof. Two shingles at the lower side of the roof, and upon which one of the jacks rested, slipped out of place and fell to the ground. At the same instant the jack and hook slipped off, thereby causing the rope and platform to fall.

In his testimony the plaintiff described the staging and the materials by which it was upheld, and stated that when the staging was put up he tested the falls by swinging upon each of the ropes attached to two of the hooks "before we put the scaffolding on." Lee Wilson, a witness for the defendants, was one of the men working with the plaintiff. Wilson testified that, with the assistance of one Doremus, he placed the hooks on the roof and tested them; that he waited at each

hook until it was tested, and this one looked perfectly safe; that in this particular case he had no doubt of its safety, but because of the appearance of the shingles he made an extra test; that he made an examination of the shingles to see if they were nailed or loose, and they were not loose at the time he put down the jack. The plaintiff did not take part in placing the hooks on the roof or share in putting up the apparatus, except that he tested the falls as above stated. As to the safety of the shingles and of the placing of the hooks thereon, he relied upon the defendants and upon his fellow-workmen; also, a member of defendant partnership was present when the scaffold was put up. The roof was old and weather beaten. Immediately after the accident some pieces of shingle of that character, apparently corresponding to the shingle-space left vacant on the edge of the roof, were found lying on the ground where the scaffold fell. These were exhibited to the court in connection with the testimony, but are not before us.

It was possible to have secured the scaffold against slipping of the shingles and a consequent fall, by fastening a rope to the hooks and tying it to a chimney on top of the roof. This actually had been done while they were painting another side of the house. Under the circumstances shown, we cannot say that there is no evidence tending to prove that the defendants negligently failed to provide plaintiff a safe scaffold upon which to work.

The accident occurred on the sixteenth day of October, 1912. At that time there was in effect a statute relating to the liability of employers for injuries of this kind. (Stats. 1911, p. 796.) Section 1 of that act provided that in actions of this class, "the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee." It was further provided that it shall not be a defense that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant. Negligence of the defendants having been shown, the burden was upon the defendants to establish their plea of contributory negligence. In order to establish such plea, it must have been made to

appear not only that the plaintiff was negligent, but that such negligence was a proximate cause of the accident; and even if these conditions were established, the plaintiff's cause of action could not be entirely defeated if the court or jury found from the evidence that the contributory negligence of the plaintiff "was slight and that of the employer was gross, in comparison." Applying the evidence in this case to the rules governing contributory negligence under this statute, we cannot say that the court was not justified in its finding that plaintiff's injuries were not proximately caused or contributed to by his own negligence or fault. There is some testimony tending to show that the plaintiff, in some of his movements to and fro upon the scaffold, violated certain rules current among painters which are usually observed for the purpose of avoiding accident. But these acts of the plaintiff had been completed prior to the time of the accident, and were not such as to require the court to find that they were the acts which caused the scaffold to fall.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1620. Third Appellate District.—March 5, 1917.]

CHARLES A. STEWART et al., Respondents, v. STEWART HOTEL COMPANY (a Corporation), et al., Appellants; CAROLINE B. DETWILER et al., Cross-complainants and Appellants.

STEWART ESTATE COMPANY (a Corporation), Respondent, v. STEWART HOTEL COMPANY (a Corporation), Appellant; CAROLINE B. DETWILER et al., Appellants; STEWART ESTATE COMPANY et al., Respondents.

CORPORATIONS—TRANSFER OF ASSETS FOR STOCK—AVOIDANCE OF FINANCIAL RUIN—LEGALITY OF TRANSACTION.—A corporation, to save itself from financial ruin, may, in view of section 343 of the Civil Code, permitting corporations to acquire their own stock under the assessment scheme provided by law, make a transfer of its assets in consideration of a delivery to it of its own stock, without violating

the provisions of section 309 of such code, declaring that directors of corporations shall not divide, withdraw, or pay to the stockholders any part of the capital stock.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

William P. Hubbard, for Appellants Stewart Hotel Company, Noah W. Gray, and Charles E. Linzee.

Stratton, Kaufman & Torchiana, and W. W. Kaufman, for Appellants Caroline B. Detwiler, De Etta A. Detwiler, A. K. Detwiler, and J. R. Harrison.

Edgar C. Chapman, for Appellants J. W. Mason and Rose Mason.

Lilenthal, McKinstry & Raymond, for Appellant John G. Barker.

Brittain & Kuhl, for Respondents Charles A. Stewart, Margaret Stewart, and Stewart Estate Company.

CHIPMAN, P. J.—The transcript concerns two actions, commenced in the superior court of the city and county of San Francisco, namely, one numbered 39,900, Charles A. Stewart and Margaret Stewart *v.* Stewart Hotel Company et al.; and one numbered 39,901, Stewart Estate Company *v.* Stewart Hotel Company et al. The actions were consolidated and tried together under stipulation that the evidence taken should apply interchangeably to each of said actions. Both are in form the ordinary actions to quiet title—the action 39,900 to the title to a certain leasehold interest in the real estate referred to in and the subject of the action 39,901, and also certain furniture and equipment constituting what is spoken of as the hotel plant of the Hotel Stewart, situated on Geary Street, between Mason and Powell Streets, in said city. The controversy is between plaintiffs in both actions and the defendants, the Stewart Hotel Company and certain of its stockholders.

The Stewart Hotel Company was incorporated in June, 1906, for the purpose of conducting a hotel soon after the great fire and earthquake of April, 1906. The corporation acquired certain leasehold interests in some improved lots situated at the corner of Gough and Eddy Streets, in said city. There were six incorporators, each of whom contributed five thousand dollars, which appears to have been the only cash contributions to the corporation. They were plaintiffs, Charles A. Stewart and Margaret Stewart, his sister, and defendants John W. Mason, John G. Barker, T. W. Nowlin, and A. K. Detwiler. Up to January 14, 1908, the Stewart Hotel Company had issued six thousand shares of its authorized capitalization of seven thousand five hundred shares, of the par value of ten dollars each. The buildings on these lots were reconstructed and put in condition for hotel purposes and were opened to the public under the name of Jefferson Hotel. Charles A. Stewart was president of the corporation, and both he and Margaret Stewart were at all times members of the board of directors until shortly after May 12, 1908, and jointly owned two thousand shares or one-third of the issued shares of the Stewart Hotel Company. They also owned a lot on the southerly side of Geary Street, near Powell, upon which they erected an eight-story building to be known as the "Hotel Stewart." During the progress of the construction of this building the Stewart Hotel Company entered into negotiations with the Stewarts, Charles and Margaret, for a lease of the Hotel Stewart, and, in the latter part of September, 1907, the work of installing the furniture and equipment was commenced and the hotel was opened for business the latter part of November or early in December, 1907. On January 2, 1908, a lease of the Hotel Stewart premises was entered into between the Stewarts, individually, and the Stewart Hotel Company, "for the full term of ten years from and after the first day of January, 1908," at the monthly rental of three thousand five hundred dollars, containing the usual covenants found in such leases, and requiring the lessees to furnish a surety bond in the sum of fifteen thousand dollars to secure the payment of rents and the keeping of the terms of the lease. The books of the Stewart Hotel Company showed net profits of the Jefferson Hotel as follows: In January, 1908, \$1,566.56; in February, \$2,991.25; in March, \$1,901.37; in April,

\$1,474.86. The Hotel Stewart was fitted out at an expenditure of \$106,528.69, on account of which there had been paid by said company, prior to May 12, 1908, as found by the court, "only the sum of \$24,328.12," and that on that date the company was indebted to various creditors about the sum of ninety thousand dollars, and, in addition thereto, two thousand dollars on a promissory note to Ella R. Ransom and \$3,528.60 to the Stewarts for rent of the Hotel Stewart. It appeared that the Hotel Stewart, to the close of April, 1908, suffered operating net losses as follows: January, 1908, \$5,516.45; February, \$1,664.25; March, profit, \$420.70; April, loss, \$1,369.95. The statement of accounts payable showed an indebtedness at the end of January of \$122,754.88 and at the end of April of \$133,054.13.

The court made the following finding: "XIII. The court finds that on the twelfth day of May, 1908, and for two or three months prior thereto, said defendant Stewart Hotel Company owed to W. & J. Sloane Company, one of its creditors, a sum in excess of fifty thousand dollars for furniture and carpets installed in said hotel. That said W. & J. Sloane Company, together with other creditors, had been pressing said defendant Stewart Hotel Company for some months previous for payment of their debts; that said W. & J. Sloane Company had, shortly prior to the twelfth day of May, 1908, threatened that unless their indebtedness was immediately or quickly adjusted, they would institute litigation and either attach all the property of the defendant Stewart Hotel Company, or involve it in expensive and ruinous litigation. That defendant Stewart Hotel Company endeavored to raise funds to meet the obligations of said W. & J. Sloane Company, but was unable to do so. That said defendant Stewart Hotel Company endeavored to obtain terms and time from said W. & J. Sloane Company and its other creditors, but was refused any and all concessions or indulgence or additional terms or time or credit. That said defendant Stewart Hotel Company was unable to obtain financial assistance from either its stockholders or from banks in San Francisco."

There had been much discussion in the board of directors as to the financial stress under which the Hotel Stewart was being operated, and on May 2, 1908, the president called a

special meeting, at which the minutes show the following—all directors being present except Barker:

“The purpose of the meeting was announced to be for the purpose of considering and acting upon a proposition for the disposal of this company’s lease of the Hotel Stewart together with the hotel plant consisting of furniture and fixtures and all personal property, as a whole.

“Charles A. Stewart and Margaret Stewart, as individuals, asked the board if the Co. would accept a proposition from them to take the Hotel Stewart off the hands of the Co. and assume all the liabilities of the Co., incurred in promoting the same, in consideration of \$20,000.00 of the capital stock of the Co. held by said Chas. A. and Margaret Stewart to be turned back to the treasury of the Co.

“A general discussion of said proposition was had and the board expressed a willingness to accept such a proposition, substantially as offered, if the details could be equitably adjusted between the parties, and in order to act intelligently it was suggested that the offer be put in writing and submitted to the board.

“Adjourned.

“T. W. Nowlin, Sec.”

The minutes for May 12, 1908, show as follows:

“The board met pursuant to notice, at the office of the company, No. 848 Gough street, San Francisco, Cal., this 12th day of May, 1908, at eight o’clock p. m. Present, Chas. A. Stewart, president; Margaret Stewart; John G. Barker; John W. Mason; T. W. Nowlin. Mr. Noah W. Gray met with the Board. The minutes of the last regular and adjourned and special meetings were read and duly approved. . . .

“The following proposal, in writing, was submitted to the board by Chas. A. Stewart and Margaret Stewart:

“San Francisco, Cal., May 12th, 1908.

“Board of Directors, Stewart Hotel Company.

“Gentlemen: The undersigned, Charles A. Stewart and Margaret Stewart hereby offer and tender to the Stewart Hotel Company the following proposition: We will take an assignment of the lease of the Hotel Stewart on Geary street near Powell and a bill of sale of all the furniture and fixtures and hotel plant therein, from the company, and in consideration therefor will transfer to the company all of the capital

stock which we own in the Stewart Hotel Company, being two thousand shares of the par value of twenty thousand dollars. We will assume and pay all the liabilities incurred and now outstanding in promoting and operating the Hotel Stewart and hold the company harmless therefrom and will assume and pay the note of Ella R. Ransom for the sum of \$2000.00. The company to assume and pay all the liabilities incurred and now outstanding on account of the Hotel Jefferson and hold us harmless therefrom. All accounts to be brought up to May 1st, 1908. And this offer to take effect as of that date.

Very respectfully,

“CHAS. A. STEWART,
“MARGARET STEWART.”

“Upon motion of Director Jno. W. Mason and second of Director T. W. Nowlin it was resolved that the said proposal of Chas. A. Stewart and Margaret Stewart, as submitted, be accepted by this company and that the president and secretary be, and they are hereby, instructed and empowered to execute on behalf of the company whatever instruments may be required to effect the transfer covered by said proposal, and that the stock received from said Chas. A. Stewart and Margaret Stewart on account of said transfer be turned into the treasury of this company. Said resolution was unanimously adopted by the vote of the directors present, excepting the directors Chas. A. Stewart and Margaret Stewart who abstained from voting on said resolution.

“Adjourned.

“T. W. NOWLIN, Secretary.”

The transaction was consummated by bill of sale of the furniture and equipment of the Hotel Stewart executed by the corporation to the Stewarts, taking date, however, of May 1, 1908. The bill of sale recited that the conveyance “is made without reservation on the part of said first party (the corporation) but subject to all outstanding claims for the purchase of said described personal property or any part thereof, which said claims the second parties (the Stewarts) have assumed and agreed to pay holding said first party free from all liability therefor.” The assignment of the lease declared that it was “intended as a cancellation of said lease and merger of the same in the said parties of the first part therin named” (the Stewarts). The proposition of the Stewarts was that “all accounts to be brought up to May 1st, 1908.

And this offer to take effect as of that date"; and this was the date at which the relation of the corporation to the business of the Hotel Stewart ceased. At this point it may be stated, as found by the court, that the Stewart Estate Company, plaintiff in action 39,901, "since the 30th day of April, 1908, has been a corporation duly organized," etc., and that, on May 20, 1908, the Stewarts conveyed to the Stewart Estate Company, by grant deed, the said lots and hotel buildings on Geary Street and the leasehold property. The Stewarts, Charles and Margaret, hold all the stock in the Stewart Estate Company and went into possession and control of the Hotel Stewart at the date of the transfer by the Stewart Hotel Company, and ever since have been in possession and control of said property, receiving to its use the issues and profits thereof. Says the brief of appellants: "The principal legal question involved is whether the transaction of May 12th, 1908, between the defendant Stewart Hotel Company, on the one hand, and the plaintiffs Charles A. Stewart and Margaret Stewart on the other, while acting as directors and stockholders of that corporation, violated section 309 of the Civil Code."

This section provides as follows: "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they create any debts beyond their subscribed capital stock; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided, nor reduce or increase the capital stock, except as herein specially provided. . . . Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence."

In their answers and cross-complaints it is sought to have the transfer of said lease to the Stewarts declared to be a nullity; that plaintiffs be required to account for the rents, issues, and profits of said real and personal property from the first day of May, 1908, for reasonable attorney's fees, for judgment against plaintiff Stewart Estate Company and the cross-defendants, Charles A. and Margaret Stewart, for the amount found due upon such accounting, and quieting the title of defendants to said leasehold and personal property.

The court adjudged the plaintiffs to be "the absolute owners of the property described in the complaint herein, and are entitled to the exclusive possession thereof," and that "defendants have not, nor has either or any of them, any right, title, interest or claim in or to the property described in the complaint." Defendants appeal from the judgment and from the order denying the several motions for a new trial.

It becomes necessary to state such further findings of fact as formed the basis of the court's conclusions of law and judgment. We quote from the findings in action 39,901. Following finding XIII, above quoted, the court found:

"XIV. The court finds that if attachment proceedings had been instituted by said W. & J. Sloane Company or the other creditors, or bankruptcy proceedings had been instituted by them, it would have involved the defendant Stewart Hotel Company in heavy loss and possible ruin.

"XV. The court finds that on said twelfth day of May, 1908, and for some time prior thereto, the lease that defendant Stewart Hotel Company had of said Stewart Hotel property was proving a heavy burden and a liability, which said Stewart Hotel Company was at that time unable to meet."

The court found that at the time the Stewarts' proposal was acted upon all the stockholders of the Stewart Hotel Company were present "save and except (interveners) Caroline B. Detwiler and De Etta A. Detwiler," and as to them the court found that they "had notice and knowledge of said sale of said property and the assignment of said lease and the circumstances surrounding the same, within a short time, not exceeding ninety days, after the twelfth day of May, 1908; and that said interveners Caroline B. Detwiler and De Etta A. Detwiler did not at any time protest or object thereto and did, by their failure to protest and object thereto, acquiesce in said transaction."

As to the motive for entering into the transaction the court found as follows:

"XXI. The court finds that for the purpose of saving the defendant Stewart Hotel Company from financial loss and ruin, and for the purpose of relieving said Stewart Hotel Company from the burden of the indebtedness incurred in the equipment of the Hotel Stewart, and for the purpose of relieving said Stewart Hotel Company from the burden and liability of the lease held by it, and for the purpose

of saving to the defendant Stewart Hotel Company the valuable and profit-paying asset of the Hotel Jefferson, and for the purpose of making said Stewart Hotel Company a going profit-making concern instead of a financially burdened corporation, the proposal made by said Charles A. Stewart and Margaret Stewart, hereinbefore in these findings referred to, was accepted by the defendant Stewart Hotel Company after a full and fair discussion." Also as follows:

"XXV. The court finds that the consideration paid by said Charles A. Stewart and Margaret Stewart for the conveyance and delivery to them of said hotel plant, furniture, furnishings and equipment, together with the assignment, cancellation and surrender of said lease, was a full, fair and adequate consideration, and was at the time believed by all the stockholders of said Stewart Hotel Company to be such.

"XXVI. The court finds that all the stockholders and directors present at the meeting of May 12, 1908, believed said proposal and its acceptance and the transfers made in pursuance thereof, to be for the best interests of the defendant Stewart Hotel Company, and believed them to be absolutely necessary to save said Stewart Hotel Company from serious loss or financial ruin, and they acted upon said belief in accepting said proposal.

"XXVII. The court finds that immediately after the twelfth day of May, 1908, there was a complete novation of all the indebtedness of the defendant Stewart Hotel Company arising out of the equipment, furnishing and operation of the Hotel Stewart, by and through which the Stewart Hotel Company was relieved of all of its debts aggregating, as hereinbefore found, more than ninety thousand dollars; and said debts were, with the knowledge and consent and ratification of the creditors of the Stewart Hotel Company, assumed by said Charles A. Stewart and Margaret Stewart personally, and were fully paid by them prior to the time of the commencement of this action. . . .

"XXIX. The court finds that the capital stock of defendant Stewart Hotel Company was not reduced or withdrawn or divided or paid over in any manner, or in any sum, by reason of the proposal and acceptance of May 12, 1908, or by reason of the bill of sale, transfer or delivery of the furniture, equipment, furnishings and hotel plant, or by reason of the assignment, cancellation or surrender of the lease or

the transfer to the defendant Stewart Hotel Company of said two thousand shares of stock; and further finds that it was not reduced, divided or withdrawn in any manner or for any amount, by reason of any fact alleged in any of the pleadings in this action.

"XXX. The court further finds that neither the capital stock nor the assets of said corporation were divided, withdrawn, paid over, diminished or impaired in any manner; and further finds that the leasehold of said Hotel Stewart had no value of any kind."

It was further found that the Stewart Hotel Company continued in business for more than three years after said proposal and agreement, "and no objection was at any time made to said proposal and agreement and the consummation thereof, by any of the stockholders of said corporation until the year 1912"; that all the terms and conditions of said proposal and its acceptance long prior to the commencement of this action "were fully performed, kept, discharged and executed"; that all the debts of the Stewart Hotel Company owing by it on May 12, 1908, have since said time and before the commencement of this action been fully paid and discharged; that all of the outstanding stock of said company amounts to 5,660 shares, and that there is not now in the treasury of said company the two thousand shares which were transferred to it by the Stewarts, and that said stock so transferred "has, since the transfer thereof, been in whole or in part reissued by defendant Stewart Hotel Company." It was further found that the transactions done under the proposal of May 12, 1908, "were not void nor voidable, but that each of them was duly and regularly and legally done without fraud or fraudulent intent and for a full, fair and adequate consideration"; that the Stewarts conveyed said property to the Stewart Estate Company on May 20, 1908, and that said company acquired said property "with full knowledge of the facts in these findings made," and that said conveyance to said company was not made in collusion with said Stewarts or either of them, "nor was it made to defeat the claims of defendants or interveners, or anyone else."

It cannot be disputed that in transferring to its stockholders, Charles and Margaret Stewart, the lease and plant of the Hotel Stewart, the directors of the Stewart Hotel Company were disposing of the company's capital stock—

that is to say, of its capital or assets. Among the numerous cases cited by appellants as explanatory of the statute are: *Martin v. Zellerbach*, 38 Cal. 309, [99 Am. Dec. 365]; *Kohl v. Lilienthal*, 81 Cal. 378, [6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689]; *Tapscott v. Mexican Colo. etc. Co.*, 153 Cal. 667, [96 Pac. 271]; *Schulte v. Boulevard etc. Co.*, 164 Cal. 464, [Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582].

The general rule is so thoroughly well settled that any discussion concerning its application ordinarily would be superfluous. Meeting the position of respondents that the facts here furnish an exception to the rule, appellants say: "Let it be conceded for purposes of the argument only that the transaction by which a corporation attempts to exchange its assets for certificates of stock held by a stockholder might be beneficial from the standpoint of the corporation, yet, nevertheless, we insist as a proposition of law that it is no more valid than if such transaction were a detriment to the corporation, for the simple reason that it is a transaction prohibited by statute." As we view the case, and as appellants seem to view it, this statement presents the principal question submitted for decision. Appellants cite *Martin v. Zellerbach*, 38 Cal. 309, [99 Am. Dec. 365], and *Kohl v. Lilienthal*, 81 Cal. 378, [6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689], as decisive of the question. On the other hand, respondents, while conceding the general rule to be as claimed by appellants, contend that "like all general rules, however, it is subject to certain well-recognized exceptions," which, "instead of weakening or destroying the rule, indicate most clearly the philosophy of it"; that "in this state we have no law in terms forbidding a corporation to acquire its capital stock"—i. e., its shares; that "the acquisition by the corporation of its capital stock is not, *ipso facto*, void." It is pointed out that the statute (Civ. Code, sec. 343) provides that a corporation may acquire its own stock under the assessment scheme provided by law; that a corporation may likewise acquire its own stock in payment of a debt owing by a stockholder to it, or to secure it from loss; (*Ralston v. Bank of California*, 112 Cal. 208, [44 Pac. 476]); and it may be compelled to buy back its own capital stock if at the time of its issue it contracted to do so. (*Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, [Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582].)

In the Zellerbach case (38 Cal. 300, [99 Am. Dec. 365]), two corporations, the Eureka Lake Company and the Miners' Ditch Company, owning in severalty several water ditches, and having no interests in common, agreed to form a new corporation, to be called the Eureka Lake Water Company, to which each should convey all its property, the stock of the new corporation to be distributed in certain proportions to the *stockholders* of said two old corporations. The Eureka Lake Company was indebted to plaintiff in the action, who obtained a judgment against it and became the purchaser of its property under execution sale, obtaining the sheriff's deed therefor. Before plaintiff obtained the judgment the defendant recovered a judgment against the new corporation and became the purchaser of the whole of its property upon execution and obtained a sheriff's deed therefor. Plaintiff sued to recover possession of the property which he had bought and the foregoing facts were set up as an equitable defense. It was the property of the Eureka Lake Company that was in controversy. The court, after saying that the transaction as agreed upon and attempted to be carried out, if effectual in law, would of necessity have resulted in an alienation of the entire property and capital of the Eureka Lake Company, and that not a dollar would have remained to satisfy the demands of creditors, said: "The contract was that this stock [in the new corporation] was to be issued, and it was afterward issued, *directly to the stockholders* of the Eureka Lake Company. It does not vary the principle that the consideration to be paid was stock instead of money. If the contract had been that, on the transfer of the property, the Eureka Lake Water Company would pay to the *stockholders* of the Eureka Lake Company one hundred thousand dollars in cash as the price of the property, the legal proposition involved would have been precisely the same as in this case. In either case the consideration would have been paid, not to the trustees, as a fund primarily liable to creditors, but to the *stockholders*, for their own use." It will be observed that the point decided was that the shares of the new company representing, as they did, the capital or assets of the corporation, could not be divided or distributed to the *stockholders*, for it would in effect be a distribution of the capital and was expressly forbidden by statute.

The court said: "We wish it to be expressly understood, that our decision is limited to the precise facts, as disclosed by the record. That it may not be regarded as covering broader grounds than intended, we deem it proper here to say, that we express no opinion upon the question whether property of the kind in question may be transferred by parol and the delivery of possession, or whether, if there are two rival corporations, like the Eureka Lake Company and the Miners' Ditch Company, organized for the same purpose of supplying water to a mining region where the demand is limited, which, in consequence of the greater expense of managing the two separately, and the competition, are both doing business at a loss, and are liable to become insolvent, it would not be lawful, in pursuance of their interests, to form a new corporation for the same purpose, and convey the property of both to such new corporation in the manner pursued in this instance, provided the new corporation, as a part of the arrangement, should assume and become obligated to pay all the debts of the old corporation. Such an arrangement might be for the interest of all parties, creditors as well as stockholders, and if lawful, would be valid as to all. The personal liability of the stockholders, in such case, would continue, and no property would be withdrawn from liability to the creditors' demands. The prohibition of the thirteenth section of the act concerning corporations is directed against the trustees, and seems designed to protect creditors as such, and also to protect the stockholders against their mismanagement in distributing capital stock in the form of dividends, with a view of holding out the idea that the corporation is more prosperous than it is, for the purpose of promoting some unlawful object. If all parties interested are secured from injury, and the purpose is a lawful one, the object of the provision would seem to be accomplished, and there would be no one entitled to complain. Such a transaction was regarded as lawful in *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.), 393, [66 Am. Dec. 490]. But we do not intend to express any opinion on these grave questions now, for no sufficient facts are presented in the pleadings or findings to require it, and we only allude to the questions in order to guard our opinion in so important a case from misconstruction or misapprehension."

The Lilenthal case (81 Cal. 378, [6 L. R. A. 520, 20 Pac. 401, 22 Pac. 689]), involved a similar question. There two mining corporations, the Head Center Consolidated Mining Company, a California corporation, and the Tranquility Mining Company, a New Jersey corporation, owning contiguous mining claims, formed a new corporation, to which they severally conveyed their mines, the new corporation, called the Head Center & Tranquility Mining Company, paying therefor one hundred thousand shares of the stock to the new company to each of the two corporations. The case related to the shares issued to the Head Center Company. The ground conveyed by this company to the new company did not comprise all the property of the Head Center Company and it still continued to carry on corporate business and reducing ores. It was not free from debt and afterward levied an assessment and paid up its then existing indebtedness. Its term of corporate existence had not expired and the company had not disincorporated. Plaintiff Kohl and others commenced the action against the Head Center Company and certain of its officers, alleging ownership in certain of the one hundred thousand shares of the new company so received for the sale of the property of the Head Center Company. Defendants claimed that these shares were the property and assets of the Head Center Company; that the company had no right under the law to distribute them to its *stockholders* and that its directors were entitled to represent and vote them at all meetings of the new company. Plaintiffs had judgment in the lower court and on appeal the judgment was reversed. Among other things, the court said: "There is, however, one other fact found by the court, necessary to the support of its judgment, if under the law it could be supported at all, but which finding we do not think is supported by the evidence. That finding is, that it was 'mutually understood and agreed by and between the stockholders of both the old companies, that the stock of the new company should be equally divided between and belong to the *stockholders* of the old companies.' " It was not decided that the consolidation was illegal. The point decided was that the *stockholders* of the old Head Center Company (plaintiffs being such) were not entitled to have their proportion of the stock of the new company distributed to them, for the reason, given in the

Zellerbach case, that it would in effect be distributing the capital or assets of the Head Center Company.

So it was held in *San Francisco etc. R. R. Co. v. Bee*, 48 Cal. 398, 405: "It was not competent to the members of that corporation to dissipate this fund and place it beyond the reach of creditors by merely going through the process of re-incorporation, taking on a new corporate name, transferring the assets of the old corporation to the new one without consideration, and *issuing the capital stock in the new corporation to the holders of the capital stock of the old corporation*. This transaction involved a breach of positive statute law."

We will next notice two of the many cases cited by respondent.

In *Ralston v. Bank of California*, 112 Cal. 208, [44 Pac. 476], one Baum held a certificate for sixty of defendant's shares, which provided that no transfer of the stock would be made on the books until payment of all indebtedness due the bank from the stockholder in whose name the stock might stand. In 1881 Baum transferred the stock to Sather, who, on September 13, 1886, demanded the transfer of the stock. Baum was then indebted to the bank beyond the value of the stock. The demand was refused. Soon after, Sather died and, in April, 1888, said shares were distributed to plaintiffs in trust under Sather's will. On March 10, 1887, the bank sold and transferred to Greenebaum & Co., at a large discount, the indebtedness held by it against Baum. On July 3, 1888, plaintiffs demanded registry of the transfer of the stock, which was refused unless plaintiffs would pay the balance of its claims against Baum above the amount received from Greenebaum & Co. The action was in trover for the conversion of the shares. Defendant recovered in the trial court and on appeal the judgment was reversed and a judgment directed in favor of plaintiffs for the value of the shares at the time the second demand was made, and interest from that date. We quote from the opinion:

"The argument that the corporation becomes the owner of the shares converted, and hence that its stock is reduced otherwise than in the manner provided by law (Civ. Code, sec. 359), and hence further that such conversion is legally impossible because contravening the policy of the law, has no great force. If necessary to save itself from loss, the bank might have contracted for and have received the title to these

shares in payment of Baum's debts to it, and the transaction would have been perfectly legal. (*Ex parte Holmes*, 5 Cow. (N. Y.) 426.) With the same purpose in view the bank, apparently in good faith and under claim of right, refused the registry, and this had the undesigned effect of converting the shares; and it is not perceived how acquisition of title by this means can, though wrongful as regards the plaintiffs, be more obnoxious to public policy than by contract in the case supposed. The authorized capital is not reduced, for the shares are not extinguished, but may be reissued. (Cook on Stocks and Stockholders, sec. 314; Morawetz on Corporations, sec. 434; *Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655, [34 Pac. 444].)"

The court said it would be legal for a corporation to take the shares of a stockholder in discharge of his indebtedness. Now, the stockholder's liability to the corporation is an asset—an account or bill receivable. If he is solvent and able to pay, the bank would have no more right to exchange this asset for his stock than to buy the stock outright. What the court meant and in fact said was, that to save itself from loss the bank might do this, though under a strict application of the rule it would violate section 309 of the Civil Code. In short, here was an exception to the rule.

Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, [Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 582], was a case where, coincidentally with his subscription to the stock of defendant company, a written agreement was entered into between the latter and plaintiff that the company would repurchase the stock subject to the terms stated. The action was on the contract, plaintiff offering and being in a position to restore the shares. Defendant had judgment on its demurrer to the complaint and plaintiff appealed. The supreme court reversed the judgment and ordered that the demurrer be overruled with leave to defendants to answer. As stated in the opinion: "The position of the respondent is that the contracts for the retaking by the corporation of its own shares are illegal and void, as in violation of the provisions of section 309 of the Civil Code, prohibiting directors of corporations from dividing, withdrawing or paying to the stockholders, or any of them, any part of the capital stock, or from reducing or increasing the capital stock, except as provided in the section." After showing that the phrase, "capital

stock," as used in the section, means the assets and not the shares, and also pointing out that, "although the prohibition runs, in terms, only against the directors, the effect of the section is to deprive the stockholders as well of power to do the forbidden acts" (citing cases), the opinion proceeds: "In other jurisdictions, the authorities show a sharp conflict over the question whether, in the absence of any statutory or charter restrictions, a corporation may employ its assets for the purchase of shares of its own stock. (Cook on Corporations, 6th ed., sec. 311.) But in view of the code provisions to which we have referred, it cannot be doubted that, in this state, a corporation is not authorized to make such purchase, since the result would be to illegally withdraw, and pay to a stockholder a part of the 'capital stock.' (*Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655, 661, [34 Pac. 444].) The want of power to buy its own stock does not prohibit a corporation from taking the stock in satisfaction of a loan, or when otherwise necessary to save itself from loss (*Ralston v. Bank of California*, 112 Cal. 208, 213, [44 Pac. 476]), but the general rule is, as above stated, that the purchase is unauthorized. Thus, this court has condemned, as in violation of section 309, a by-law assuming to give to any stockholder, the right, upon sixty days' notice, to withdraw from the corporation, and to receive, upon surrender of his stock, the amount paid therefor. (*Vercoutere v. Golden State L. Co.*, 116 Cal. 410, [48 Pac. 375].)"

It would serve no useful purpose to review all of the many cases, English and American, cited by counsel in their elaborate briefs. The entire field of the law upon the question seems to have been swept clean of cases and text-books bearing upon it. The inquiry is simmered down, we think, to the basic question, Does the general rule, as to which there is no controversy, admit of no exceptions? If not, the decision of the lower court was wrong. If the rule admits of exceptions, the question is, Do the facts here constitute an exception?

We need go no further than to *Ralston v. Bank of California*, 112 Cal. 208, [44 Pac. 476], and *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, [Ann. Cas. 1914B, 1013, 44 L. R. A. (N. S.) 156, 129 Pac. 282], to find exceptions to the rule. In the Ralston case the court said: "If necessary to save itself from loss, the bank might have contracted for and received title to these shares in payment of Baum's debts to

it, and the transaction would have been perfectly legal." In the Schulte case, after having stated the general rule, the court said: "The want of power to buy its own stock does not prohibit a corporation from taking the stock in satisfaction of a loan or where otherwise necessary to save itself from loss." What did the court mean when it said that a corporation not only might take its stock in satisfaction of a loan *or when otherwise necessary to save itself from loss?* We feel authorized to assume that the court meant to say that circumstances might arise other than such as appeared in those two cases where the corporation would be justified in taking over the shares of one of its stockholders, and that each case must be governed by its own peculiar facts; that the general rule, though well settled in this state, is not inflexible and unyielding.

The benefit or loss to the corporation in the present case must be determined from the situation of the parties and the property involved at the time the proposal of the Stewarts was accepted. The contract was fully executed and no objection from directors or stockholders was suggested for nearly four years, and then only by the Detwilers, who, the court found, had notice of the contract shortly after it was entered into. And all liabilities existing at that time have been fully paid. Clearly, the court, from its view of the contract, did not err in refusing defendants the right to go into the question of the profits and losses to the Stewarts in operating the Hotel Stewart. It is now quite impossible for defendants to place the parties back where they stood in May, 1908, and they do not offer to do so. They say that this is not required of them because the transaction was absolutely void *ab initio*. What, then, were the facts upon which the learned trial judge based his decision?

Briefly epitomized, the facts were as follows: The Stewart Hotel Company was operating the Hotel Jefferson at a large profit monthly. The net earnings for January, February, March, and April, 1908, amounted to about eight thousand dollars. Believing it could extend its hotel business profitably by operating the Hotel Stewart, it leased the premises from the owners, the Stewarts, and proceeded to equip the hotel at a cost of over one hundred and six thousand dollars. It opened the Hotel Stewart in the latter part of November, 1907, and operated it about five months at a loss of over eight

thousand dollars. In April, 1908, it found itself indebted about ninety thousand dollars for furnishings, and one of its largest creditors, Sloane & Co., whose claim amounted to about fifty thousand dollars, was pressing payment and threatening to close the hotel or otherwise proceed to collect its claim through suit. All efforts to obtain further extension of credit or obtain loans from banks had failed. The corporation also owed the Stewarts one month's rent and two thousand dollars on a promissory note past due. In this situation of its financial affairs, the Stewarts made the proposal, which was consummated, to take over this lease and to assume the liabilities above referred to and surrender to the corporation their two thousand shares of its stock, of the par value of twenty thousand dollars. These shares were not extinguished, nor were they distributed to the stockholders, but were placed in the treasury and, as the court found, have since that time been "in whole or in part reissued or used by defendant Stewart Hotel Company." The testimony of Mr. Rich, manager of the Palace Hotel, was that the plant transferred to the Stewarts "might possibly have been worth seventy thousand dollars." Mr. Woods, manager of the Hotel St. Francis, testified: "In view of the conditions that obtained at that time, I would place the value at what the equipment cost, less twenty-five per cent. In other words, if the equipment cost one hundred and six thousand dollars I would deduct from that twenty-five per cent, and I would call that the value of the entire plant including the leasehold and everything of the kind." There was evidence, and the court found, "that the leasehold of said Hotel Stewart had no value of any kind." The value of the equipment and the supplies on hand, according to the testimony of Rich and Woods, was several thousand dollars less than the amount of the liabilities which the Stewarts assumed and paid. The books of the company showed liabilities amounting to over one hundred and ten thousand dollars, while the assets, as testified to by Woods and Rich, had a value of about eighty-six thousand dollars. The Stewarts not only took over and subsequently paid these liabilities, but surrendered their two thousand shares in the company. Had the Stewarts retained these shares, no possible question could have arisen as to the legality of the transaction, for it was within the powers of the corporation and apparently very beneficial. It is beyond

question, too, that in the surrendering to the corporation by the Stewarts of their two thousand shares the benefit to it was increased to the extent of their value. We cannot see that the transfer of this stock effected a diminution or reduction of the assets of the corporation, nor can it reasonably be said to have been a trafficking or bargaining by the company in its capital stock. The complexion of the transaction must be judged in its entirety. There was no evidence of overreaching or unfairness, no semblance of fraud in the transaction. Mr. Stewart, acting with other directors, made every reasonable effort without avail to obtain extensions of credit or effect a loan to tide over the emergency, and it was only by mortgaging the fee to the real property as well as the personal property that the Stewarts were able to make satisfactory arrangements with creditors. The principal asset of the corporation remaining after the transfer of the Hotel Stewart plant was the Jefferson Hotel, fully equipped and operating at a profit. The company was solvent. Its monthly profits about equaled its losses on the Hotel Stewart. Unquestionably the transaction not only brought a substantial benefit to the corporation but was "necessary to save itself from loss" and threatened bankruptcy. The corporation relieved itself and its stockholders of a large indebtedness and of a losing venture and had remaining its only asset of value, which value was increased by taking the Stewarts' shares. Without going further into the surrounding circumstances, we think the facts furnish an exception to the general rule and that the transaction was valid.

Other questions are presented in the briefs covered by the findings, but as all parties seem to agree that the case must turn upon the legality or illegality of the contract between the directors and the Stewarts, our conclusion on the point renders further consideration of the case unnecessary.

The judgment and order are affirmed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 3, 1917.

[Civ. No. 2213. Second Appellate District.—March 8, 1917.]

ALBERT SIMMONS et al., Copartners, etc., Respondents, v. EMIL FIRTH, Appellant; BUILDING CONTRACTORS SUPPLY COMPANY (a Corporation), et al., Respondents.

MECHANIC'S LIEN—FORECLOSURE—ENGINEER'S CERTIFICATE—PLEADING—

OMISSION TO ALLEGE—LACK OF PREJUDICE.—In an action by original contractors to enforce a mechanic's lien for an unpaid balance alleged to be due them upon a contract for the construction of a concrete reservoir, the defendant is not prejudiced by an error in overruling his demurrer to the complaint for uncertainty, in that it failed to make any reference to the engineer's certificate of completion of the reservoir required by the contract as a prerequisite condition to plaintiffs' right to final payment, or to allege any excuse for not producing the same, where it appears from the evidence received without objection that such certificate was refused upon the ground that plaintiffs had not, as alleged by them, completed the reservoir in accordance with the terms of the contract and performed all the conditions thereof.

ID.—COMPLETION OF WORK—TRIVIAL OMISSIONS.—In the construction of a concrete reservoir at an agreed price of \$5,995, the omission of five items called for by the specifications of the aggregate cost of \$62.85, is trivial, and cannot be deemed to constitute such a lack of completion as to prevent the filing of liens.

ID.—DEFECTS IN CONSTRUCTION—FAULTY SPECIFICATIONS—CONTRACTORS NOT RESPONSIBLE.—In the construction of a concrete reservoir the contractors are not to be held responsible for leakages in the reservoir or for defects in the construction of the roof thereon, where the walls and roof of the reservoir were constructed in strict accordance with the plans and specifications furnished by the owner's engineer.

ID.—DELAY IN COMPLETION—FAILURE OF OWNER TO SUPPLY WATER—ESTOPPEL.—In such an action the owner is estopped from contending that the plaintiffs failed to complete the reservoir within the contract time, where such failure was due to the failure of the owner to furnish plaintiffs with a necessary supply of water, as provided by the contract.

ID.—CONTRACT FOR CONSTRUCTION OF RESERVOIR—SUPPLY OF WATER BY OWNER—PLACE OF—SILENCE OF CONTRACT—PAROL EVIDENCE ADMISSIBLE.—Where specifications for the construction of a reservoir provide that the owner shall supply the contractors with water for mixing purposes, but are silent as to the place at which the owner is to deliver the water, parol evidence is admissible to show that

it was agreed that the water was to be delivered through a pipeline then in course of construction, at or near the proposed reservoir site.

APPEAL from a judgment of the Superior Court of Riverside County. F. E. Densmore, Judge.

The facts are stated in the opinion of the court.

Sheldon Borden, and George H. Moore, for Appellant.

Purington & Adair, for Respondents Albert Simmons et al.

George C. Mansfield, Shankland & Chandler, and A. H. Winder, for Respondents Building Contractors Supply Company et al.

SHAW, J.—In this action plaintiffs as original contractors sued to enforce a mechanic's lien for an unpaid balance alleged to be due them upon a contract made with Emil Firth, pursuant to which they constructed a concrete reservoir at an agreed price of \$5,995. The defendants other than Firth filed answers and cross-complaints whereby they sought judgment against plaintiffs, and the enforcement of liens upon the same property for materials furnished to plaintiffs as such original contractors for use and used in the construction of the reservoir. After a demurrer interposed by Firth to the complaint was overruled, he filed an answer thereto, which, among other things, contained a counterclaim against plaintiffs for a sum in excess of the amount of plaintiffs' alleged lien, and also filed answers to the cross-complaints. Upon the issues thus joined a trial was had which resulted in a judgment in favor of plaintiffs and against Firth for a balance of \$2,259.61, which was declared a lien upon the property described in the complaint, all as prayed for therein, and gave judgment against plaintiffs in favor of cross-complainants, payment of which was ordered to be made from the proceeds of the judgment so rendered in favor of plaintiffs and against defendant Emil Firth.

From the judgment so entered, Firth, adopting the alternative method in presenting the record, has appealed.

Conceding the court erred in overruling defendant Firth's demurrer to the complaint for uncertainty (*Wyman v.*

Hooker, 2 Cal. App. 36, [83 Pac. 79]), in that it failed to make any reference to the engineer's certificate of completion of the reservoir required by the contract as a prerequisite condition to plaintiffs' right to final payment, or allege any excuse for not producing the same (*Coplew v. Durand*, 153 Cal. 278, [16 L. R. A. (N. S.) 791, 95 Pac. 38], and cases there cited), nevertheless, since it appears from the evidence received without objection that the engineer refused such certificate upon the ground that plaintiffs had not, as alleged by them, completed the reservoir in accordance with the terms of the contract and performed all the conditions thereof, the substantial rights of defendant were not prejudiced by the ruling, without which this court should not reverse the judgment. (Code Civ. Proc., sec. 475; Const., art. VI, sec. 4½.) The issue presented to the court for trial was whether or not plaintiffs in constructing the reservoir had complied with the contract, since if they had, the withholding of the certificate as evidence thereof was unwarranted and want thereof could not be urged as a defense to plaintiffs' right to recover.

Appellant attacks the finding of the court to the effect that, notwithstanding the fact that five items called for by the specifications of the aggregate cost of \$62.85 (which the court held to be trivial and an allowance for which was made), were omitted, the reservoir was substantially completed on November 8, 1912, and on November 9th it was occupied and thereafter continually used by Firth. Section 1187 of the Code of Civil Procedure, provides that trivial imperfections in the construction of a building, improvement, or structure shall not be deemed such a lack of completion as to prevent the filing of a lien; and in *Schindler v. Green*, 149 Cal. 752, [87 Pac. 626], it is said: "If the omission or imperfection is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action." The question is one of fact to be determined by the trial court in each instance from the evidence and circumstances in the case. Compared with the entire structure called for by the contract, it cannot be said upon the evidence presented by the record that these items were other than as found by the court to be trivial omissions for which defendant could be and was compensated in damages. To the same effect are: *Harlan v.*

Stufflebeam, 87 Cal. 508, [25 Pac. 686], and *Perry v. Quackenbush*, 105 Cal. 299, [38 Pac. 740]. It is also claimed that the reservoir was defective in that it was not impervious to water, but constantly leaked; that the roof thereon constructed by plaintiffs was defectively constructed, by reason of which fact a large part thereof was blown off by the wind some time in December. It appears from the record that at the trial not only the specifications, but detail plans for the construction of the roof were offered in evidence. These plans and details of construction, however, are not brought up in the record, and without them some of the specifications are incomplete. The contention of respondents is that not only the walls of the reservoir, but the roof constructed thereon, were in strict accordance with the plans and specifications, and there is evidence disclosed by the record which clearly tends to sustain such contention. That the walls of the reservoir were not impervious to water, is conceded; but the evidence of experts introduced on behalf of plaintiffs is to the effect that such leakage was due, not to faulty construction, but to the fact that the walls of the reservoir as called for by the specifications were not such as were calculated to render the reservoir impervious to water without the interior thereof being plastered, and that no reservoir built in accordance with the specifications furnished by defendant's engineer would hold water without more or less leakage. That the evidence sustains this contention admits of no doubt. The same observations are true with reference to the alleged defective construction of the roof, which it seems did not blow off until after the completion of the structure and use thereof by defendant. The evidence tends to show that it was constructed in accordance with the detailed plans, not before us, and specifications furnished therefor by defendant's engineer, and that its failure to withstand the force of the wind was due to faulty specifications which did not provide for proper anchorage, and not to failure on the part of the contractors to construct the same in accordance therewith. One of the omissions claimed to exist was the alleged fact that plaintiffs did not install check-valves in accordance with specifications. The specifications refer to detail No. 1 for method of outlet and inlet, and while this detail of plan is not incorporated in the record, we gather from the opinion of the trial judge it described the device as "a 10-inch check-valve or flap-valve."

At all events, plaintiffs called upon the engineer for a design of valve to be used, and he drew a sketch and delineation of a valve the use of which he authorized and in accordance with which plaintiffs had the two valves made and installed the same. These valves, by reason of the leather cushion becoming hard and dry, though constructed as required by the engineer, leaked. But here, again, in the absence of any specifications therefor, plaintiffs appear to have followed the detailed drawing furnished them by the engineer, and having done so, they should not be held responsible for such defect.

Appellant strenuously contends that the evidence was insufficient to justify the finding that the owner occupied and used the reservoir from November 9, 1912. Here again, there appears to be a conflict of evidence; but there is testimony to the effect that defendant did exercise dominion over the reservoir by doing work upon the roof, other than that called for by the specifications, deemed necessary to protect the paper-covering of the same from blowing off in case of storms, and on November 22d filled the same with water; and immediately upon taking possession commenced erecting a fence around the same; indeed, the testimony of defendant's inspector of the work is that he, as defendant's employee, built a fence around the edge of the reservoir, painted the ladders, and did other odd jobs deemed necessary, and filled the same with water to a depth of four or five feet, at which time he observed no leaks other than in the check-valve, designated a flap-valve. It may be conceded that as to all questions of fact submitted to the court for determination, there was a conflict of evidence, a large part of which offered on behalf of defendant was that of the engineer who prepared the specifications and who, very naturally, insisted that if followed they were sufficient for the purpose for which the reservoir was intended. It is likewise clear that the trial court regarded his testimony as unsatisfactory. Without discussing the evidence further, suffice it to say that it is ample to support the findings attacked for want of sufficient evidence.

The contract, dated May 31, 1912, provided that the reservoir should be completed within sixty days thereafter, and one of the grounds of the counterclaim and defense was plaintiffs' failure to comply with this provision. The court, however, held that defendant was estopped from availing himself of such defense for the reason that he neglected and

failed to furnish plaintiffs a supply of water for mixing concrete and mortar. As to this, the specifications contained a provision that, "water for mixing concrete and mortar will be supplied by Emil Firth, the contractor to take same from nearest standpipe or pipe-line." It appears that at the time of entering into the contract, defendant had in course of construction a pipe-line leading from his pumping plant to the site of the proposed reservoir, distant a mile and a half therefrom, a map of which line he at the time exhibited to plaintiffs, and in response to the inquiry as to when he would have the water there, told plaintiffs that it would be within a week, and for them to assemble their tools and material for doing the work, and by the time they were prepared to commence the work he would have the water there; all of which, together with other evidence, tended to show there was an oral agreement made between plaintiffs and defendant Firth whereby the latter was to supply the water, not at the pumping plant, but from a standpipe or pipe-line the outlet of which was to be constructed to a point at or near the proposed reservoir. Appellant insists that the admission of all such evidence was erroneous in that it tended to vary the terms of the written contract. We are not in accord with this contention. While the agreement provided that Firth should supply the water, it is silent as to the point at which he was required to deliver the same; hence the oral agreement covered a subject as to which the contract was silent. In our opinion, it was competent for plaintiffs to show by parol that the water which defendant agreed to supply for use in the construction of the reservoir was to be delivered by him through the pipe-line then in course of construction at or near the proposed site of the reservoir. The written contract contained no provision fixing the point where the water should be delivered; thence the evidence adduced touching a subject as to which the contract was silent did not tend to vary any provision thereof. "The rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agreement upon which the instrument is silent, and which does not purport to affect the terms of the instrument." (*Savings Bank of Southern Cal. v. Asbury*, 117 Cal. 96, [48 Pac. 1081]; *Sivers v. Sivers*, 97 Cal. 518, [32 Pac. 571]; *Bradford Investment Co. v. Joost*, 117 Cal. 204, [48 Pac.

1083]; *Wolters v. King*, 119 Cal. 172, [51 Pac. 35].) In our opinion, the court did not err in admitting the testimony the effect of which was to show that the delay complained of was due to defendant's failure to deliver a supply of water necessary in the prosecution of the work.

The record discloses no prejudicial error upon which this court would be justified in disturbing the judgment in favor of plaintiffs and against Firth, for which it is declared a lien exists in favor of the former, the foreclosure of which is ordered.

This being true, the alleged erroneous rulings of the court in admitting evidence to sustain the claim of a lien in favor of Hook Brothers for which they were given a judgment against plaintiffs in the sum of \$730.61, in no wise concerns appellant, since such judgment is ordered to be paid out of the amount found due to plaintiffs from defendant Firth, for which a lien is declared, and, therefore, conceding the court erred in reaching the conclusion that Hook Brothers were entitled to judgment, defendant is not prejudiced thereby.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 395. Third Appellate District.—March 9, 1917.]

In the Matter of the Application of ROBERT DRENNAN
for a Writ of Habeas Corpus.

CRIMINAL LAW—RAPE—CONVICTION OF ASSAULT TO COMMIT CRIME—
EVIDENCE—APPEAL—HABEAS CORPUS.—A judgment of conviction of an assault to commit rape, which is not void on its face, cannot be nullified in a proceeding on *habeas corpus*, even though error was committed in admitting evidence of force under the information which charged statutory rape, as the remedy for the correction of such error is by appeal.

APPLICATION for a Writ of Habeas Corpus originally made to the District Court of Appeal for the Third Appellate District.

The facts are stated in the opinion of the court.

88 Cal. App.—18

Robert F. Drennan, *in pro. per.*, for Petitioner.

THE COURT.—The petition for the writ must be denied. Inasmuch as the petitioner is confined in the penitentiary, is not represented by counsel, but has, *in propria persona*, made this application and is not an attorney, it is deemed proper to state briefly the ground of our refusal to grant the application or to issue the writ.

The petitioner was convicted of and is now undergoing punishment for the crime of an assault to commit the crime of rape. He claims that the judgment of conviction was and is void because the crime of which he was found guilty was not within the crime charged in the information. The point is that he was therein charged with statutory rape or carnally knowing a female incapable under the law of consenting to such an act, in which case force is not a necessary element and which, where committed even with the actual consent of the female, is, under the law, a crime, and that, therefore, an assault is not a necessary ingredient of the crime. He cites and relies on the case of *People v. Akens*, 25 Cal. App. 373, [143 Pac. 795].

We considered this precise question when the petitioner's case was before this court on appeal. (*People v. Drennan*, 25 Cal. App. 645, [145 Pac. 106].) The case was not argued before this court either orally or by briefs, but it was submitted on the record. We, nevertheless, examined the record, although, under the rule, we would have been authorized and justified in dismissing the appeal without any consideration of the record. In the opinion therein filed, however, we stated that there was disclosed by the record evidence tending to show that the female child upon whom the crime was alleged to have been committed objected to and protested against the conduct of the defendant, and from this testimony we said the jury were warranted in finding that there was an assault, and that the verdict as returned was, therefore, sustainable, notwithstanding that the prosecutrix was under the age of consent. In this connection, we cited the case of *People v. Akens*, 25 Cal. App. 373, [143 Pac. 795], relied upon by the petitioner.

Whether testimony showing that the crime charged or the attempt to commit said crime was accompanied by force and against the will of the prosecutrix was inadmissible under the

information, was not pointed by the defendant when his case was before us on appeal. But whether it was or was not inadmissible, is a question which cannot be reviewed or considered to any purpose in a proceeding on *habeas corpus*. The remedy for the correction of errors occurring in the course of the trial of a case, either criminal or civil, lies wholly in an appeal, unless the judgment is absolutely void upon its face, in which case it may be nullified through the operation of a jurisdictional writ; but where it is not void upon its face it is conclusive against the party against whom it is rendered until it is set aside on appeal for errors occurring at the trial. The judgment of conviction against the petitioner is not void upon its face, and the error of which he complains cannot be reviewed in a proceeding of this character.

The petition must, as stated, be denied, and it is so ordered.

[Crim. No. 671. First Appellate District.—March 12, 1917.]

THE PEOPLE, Respondent, *v.* WILLIAM SMITH,
Appellant.

CRIMINAL LAW—LEWD CONDUCT WITH MINOR—ATTEMPT TO COMMIT ACT—CONVICTION SUPPORTED BY EVIDENCE.—In this prosecution for the felony defined by section 288 of the Penal Code, which punishes lewd and lascivious conduct with minor children, it is held that the evidence is sufficient to support the conviction of an attempt to commit the act charged.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

Knapp Orton, and W. C. Tupper, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—The defendant was charged with the commission of the felony defined by section 288 of the Penal Code,

which punishes lewd and lascivious conduct with minor children; and the point that the appellant makes in his appeal from the judgment and order appealed from is that because defendant's conviction was of an attempt to commit the act charged there is no evidence warranting the verdict, for the reason that the information charges that the defendant placed his hands upon certain parts of a minor female child and there is no direct evidence to that effect. It is argued that he could not be convicted of an attempt, because the prosecution did not show specifically that he had made any move to place his hands upon the parts in question. The appellant also contends that the evidence does not show his guilt beyond a reasonable doubt.

Considering the latter point first, we think it sufficient to say that the jury by its verdict has decided it contrary to appellant's contention.

As to the first point urged, the evidence introduced at the trial was direct and circumstantial. There is circumstantial evidence of the defendant taking the child into a barn or vacant house, and that the child's clothing was disarranged. There is the admission on the part of the defendant that he did touch the child's clothing; and there is the testimony of the police officer that the defendant stated to him that he allowed his passion to get the best of him and that he played with the child. Upon the whole evidence the jury rendered its verdict of an attempt to commit the act charged; and we are satisfied from a review of the record that the evidence is sufficient to support the verdict and judgment. For that reason the judgment and order appealed from are affirmed.

[Crim. No. 662. First Appellate District.—March 12, 1917.]

THE PEOPLE, Respondent, v. JAMES KITLEY, Appellant.

CRIMINAL LAW—REFUSAL TO POSTPONE TRIAL—DISCRETION NOT ABUSED—VERDICT SUPPORTED BY EVIDENCE.—In this prosecution, it is held that the trial court did not abuse its discretion in denying the defendant's request for the postponement of the trial, and also, that the verdict and judgment are amply sustained by the evidence.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

Walter Stingley, and J. C. Thomas, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—Upon an investigation of the record, and after listening to the oral argument of the appellant, we are not satisfied that the trial court abused its discretion in denying the defendant's request for a postponement of the trial, and at any rate, it does not appear to us that any prejudice resulted to the defendant. As to the appellant's criticisms of the charge of the court, that charge is in our opinion clear and correct; nor do we find any merit in the point that the testimony of the prosecutrix is inherently improbable and therefore insufficient to support the verdict and judgment. On the contrary, an inspection of the record convinces us that they are amply sustained by the evidence. The judgment and order appealed from are therefore affirmed.

[Civ. No. 1633. Third Appellate District.—March 12, 1917.]

ANNIE L. LIPPERT et al., Respondents, v. PACIFIC SUGAR CORPORATION (a Corporation), Appellant.

NEGLIGENCE—DOCTRINE OF RES IPSA LOQUITUR.—Where a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

ID.—DEATH OF ENGINEER OF SUGAR-BEET PLANT—EXPLOSION OF PRE-HEATER — APPLICABILITY OF DOCTRINE.—The doctrine of *res ipsa loquitur* is applicable to an action for damages for the death of a master mechanic having the oversight of the machinery of a beet-sugar plant, from the explosion of a "pre-heater" operated by a boy of the age of sixteen years, where it is shown that it was not the duty of the deceased to personally operate the boiler, and he was informed that the heater would safely carry a steam pressure of seventy pounds, when, in fact, it was only built for a maximum pressure of forty pounds.

ID.—PLEADING—SPECIFIC ACTS OF NEGLIGENCE—RIGHT TO RELY UPON DOCTRINE—LACK OF WAIVER.—In such an action the plaintiffs are not precluded from relying upon the doctrine of *res ipsa loquitur* because they charged specific omissions of duties or acts of negligence.

ID.—RISKS OF EXPLOSION NOT ASSUMED.—A master mechanic intrusted with the oversight of all the machinery of a sugar plant does not assume the risk of the explosion of a pre-heater used in connection with the plant, where there is no evidence that the same was out of repair, or that there is any imperfection in it calling for repair, or that it is not in thorough running condition, and the same was operated by an employee under the directions of the superintendent of the plant, and not of the deceased, and upon the representation that it would withstand a steam pressure of nearly double its actual maximum resisting capacity.

APPEAL from a judgment of the Superior Court of Kings County, and from an order denying a new trial. John G. Covert, Judge.

The facts are stated in the opinion of the court.

Gray, Barker & Bowen, H. Scott Jacobs, and W. C. Petchner, for Appellant.

Lent & Humphrey, and H. P. Brown, for Respondents.

CHIPMAN, P. J.—This is an action for damages brought by the surviving wife and minor child of William Leo Lippert, who, on the fifteenth day of July, 1909, was killed by the bursting of a "pre-heater," used by defendant for the purpose of heating sugar-beet juices. At the time of the accident Lippert was twenty-eight and one-half years of age and the minor was eighteen months old. The jury found for plaintiffs in the sum of twenty thousand dollars and judgment was entered in their favor for that amount. The appeal is by defendant from the judgment and from an order denying its motion for a new trial.

Appellant makes the following points: 1. That deceased was employed as master mechanic and was intrusted with the oversight of all the machinery of the sugar-house; 2. He therefore assumed the risks of his employment; 3. Contributory negligence on the part of deceased; 4. "He fully knew and appreciated and apprehended all of the dangers surrounding his employment"; 5. That if the pre-heater was out of repair it was patent to deceased and it was his duty to have remedied its condition; 6. If that was the condition of the apparatus, he should have complained of it to defendant; 7. When deceased was employed as mechanic and assistant superintendent he expressly assumed the duty of putting all machinery into thorough running condition.

Respondents, in their brief, say: "The long and able opening brief of appellant . . . deals with adjudicated cases and legal principles applicable to litigation involving such propositions as 'Equal means of knowledge,' 'Comparative knowledge of masters and servants,' 'Continuance of employment,' 'Duties of servants to inform masters of defects and danger,' 'Precaution against a known or apparent danger,' or 'Duty of employer to repair.' The evidence in this case does not require consideration of any of those questions."

Respondents assign, as defendant's negligence: (a) Defendant's informing decedent that the pre-heater would safely carry a steam pressure of seventy pounds when, in fact, it was only built for a maximum pressure of forty pounds; (b) Defendant's failure to use ordinary care in the selection of the culpable employee, John Wegman.

In December, 1908, deceased, who was then employed in a sugar factory at Chino, San Bernardino County, wrote to

Mr. R. L. McCrea, assistant secretary of defendant corporation, the following letter:

"Mr. R. L. McCrea.

"Dear Sir: Recently learned that your company intends to start your plant at Corcoran. If the same is correct and you have not already selected a man to operate same, would like you to consider an application from me. If your company cares to consider with me the matter, kindly notify me as soon as possible. Will be in city in the latter part of the week; so would call at your office if you desired.

"Yours truly,

"Wm. L. LIPPERT."

(Written in blue pencil.) "R/R Mr. Cole. Mr. P. has written Mr. Lockwood—& so good team."

A meeting was thereupon arranged, which took place in the defendant's office in Los Angeles, on the twenty-sixth day of March, 1909. As to what then occurred, Mr. W. C. Petchner, the secretary of defendant, testified: "At that meeting, at which Mr. Lippert, myself and Mr. Cole (vice-president and general manager of defendant) were present, I referred to Mr. Lippert's application and told him we wanted somebody to take mechanical charge of the house; that Mr. Connolly (defendant's superintendent) had told us he would not care to undertake the mechanical charge of the house, and Mr. Connolly had stated Mr. Lippert was the one whom we should get, because he had been employed at the house in its construction, and in the installation of the machinery, and was supposed to understand all about it, and he would prefer to have such a man. I told this to Mr. Lippert and asked him what he knew about the house, and also asked him about his previous employment; I told him what duties we should expect from him; that he was to be there as the engineer to take charge of the mechanical part of the house, because Mr. Connolly was a superintendent merely, and not a machinist or engineer. I repeated all this explanation to Mr. Lippert, and asked him if he felt competent to take charge of the machinery of the house. He said he did; that that was his business; that he had been employed in the house the year previously and that he had made out the plan of the house wiring and the placing of the machinery, and had taken part in the installing of the machinery in the house. . . . I took up my active duties at Corcoran in the month of January, 1909, and was

there during all the time the factory was prepared for operation for that season, although I was away occasionally in San Francisco and Los Angeles. Mr. Connolly reported to me as his immediate superior while I was there, and up to the 15th of July, 1909. Mr. Lippert never made any report to me during that period or any time prior to the accident regarding any defects in the pre-heater." Mr. Cole substantially corroborated Mr. Petchner's testimony as to the conversation above set forth. On March 23, 1909, Lippert wrote from Chino to Mr. Connolly, stating that he had some work to finish at Chino and that he thought he could take the position at Corcoran about the 1st of April. He did commence work with defendant some time in April.

Mrs. Annie L. Lippert testified: "I reside in San Francisco. I was married to William Leo Lippert in Oakland in 1906. At that time he was employed by the American Beet Sugar Co. as master mechanic at Chino, California. He stayed at Chino several months and came back to San Francisco where we remained for a year and a half. Then Mr. Lippert went to work to Corcoran in the year 1908, where he remained about six months. Then he was sent for to go to work at Chino. When they employed him in the sugar factory at Corcoran, they asked him to take the house as master mechanic. He had previously worked at Corcoran helping to install some of the machinery."

There was received in evidence a contract, dated November 14, 1907, between defendant and the American Foundry & Machinery Company, under which the latter was to furnish the former with an "evaporating system," and containing specifications as to the construction thereof. Said contract provided: "Pre-heater to be of steel and to stand a working pressure of 12 pounds; steam chest to stand a working pressure of 40 pounds."

M. B. Kearney, a witness for plaintiffs, testified that he had worked as a steam-fitter in sugar factories in different states and that he was employed as such at the Corcoran plant, although eight or ten years had elapsed since he had last worked in a sugar factory; that he commenced work there about the 1st of April; that he overhauled all the steam-pipe that needed working on and put in some new pipe. Referring to the pre-heater, witness said: "It is a large cylinder shaped piece of machinery between eight and ten feet in

length, about six feet in diameter, with a number of brass tubes running through lengthways for the purpose of carrying steam." Continuing, witness explained at length the construction of the pre-heater, the location of valves for the control of steam pressure, etc., and, as to its function in the making of sugar, said: "There is an opening about in the center where the juice [of sugar beets] is admitted and drops down over those tubes and is heated by the steam—juice coming from elsewhere is pumped into the cylinder and spreads out over the heated steam-pipe and passes off into the evaporators." As to the "steam head" or "steam chest" which blew out and caused the death of Lippert, witness said: "I think the steam head is square and has a lid of cast iron, and is set back a little, kind of concave. . . . It is bolted all around with bolts two or three inches apart." He testified that, "about a week before the campaign started," he took the pressure valve apart and cleaned it; the pre-heater was steamed up for several days before the day of the explosion.

Washington A. Connolly was called as a witness by plaintiffs and testified: "I was employed by defendant at Corcoran as superintendent or sugar expert for sugar manufacturing, from the 15th of March, 1909, until about the 21st of December, 1909. My duties were to take charge of manufacturing and producing sugar from beets and take charge of chemical control of the house; that is, I would be superintendent over the chemists attending to the chemical part of the house—I was superintendent over all the employees of the Pacific Sugar Corporation outside of its office affairs. . . . Mr. Lippert was employed right along, I think, from in April or the first of May. He was hired as master mechanic by Mr. Petchner. I was told so by himself. His duties were to take full charge of all the machinery and at the time he was hired, which was not in the manufacturing season, he was to repair and overhaul everything prior to the manufacturing campaign, which was supposed to start then about the first of July. . . . Mr. Lippert was next in authority to me." Witness described the apparatus and said: "I don't know what pressure this pre-heater, or the heads of this pre-heater, were supposed to be able to withstand, or were constructed to withstand. Q. Did you ever instruct Mr. Lippert as to what pressure they were able to withstand? A. There were no instructions given, except Mr. Lippert and I got together. Q. If you will answer

me yes or no, we will get along quicker. You said you did not? A. No. Q. Did anyone instruct Mr. Lippert as to the pressure? A. As to the pressure? Q. As to the pressure that the heads were supposed to carry. A. No, sir; not that I know of. No, sir; I don't know what pressure the heads were supposed to carry." (Witness is handed a paper and asked if he knows in whose handwriting the word "Lippert" is.) "A. That is my handwriting. I presume I gave that paper to Mr. Lippert from the looks of it. That is my handwriting. Whether I gave it to Mr. Lippert or my clerk, it don't make a bit of difference, it was intended to go to Mr. Lippert. It was given to Mr. Lippert before the campaign started, I should judge about the first of July; something like that. That specifies pre-heaters. Mr. Lippert and I got those instructions up ourselves. That paper was received from nobody but myself." The paper referred to was offered and received in evidence and marked "Plaintiffs' Exhibit A." It is of some length and contains instructions for operating the various parts of the machinery in the factory. We quote: "From here draw your juice into pre-heater 'level of juice as indicated by gauge-glass.' The pre-heater is supposed to carry the full seventy pounds on steam end and twelve on exhaust or supply end. I would suggest not to carry over six pounds on supply end, then we can regulate our pressure as required." The witness continued: "Before starting up the plant I called Mr. Lippert's attention to that safety valve, about its sticking. I told him the safety valve was apt to stick occasionally. We had not operated the plant except preliminarily the morning of the 15th of July, 1909. I cannot tell if the safety valve stuck that day. . . . A few minutes before the rear end of the pre-heater blew out I was around there talking to Mr. Lippert there manipulating the pre-heater, and as near as I can remember, I think I noticed a pressure of a little over twenty pounds on the steam end, and about eight or ten pounds on the low-pressure side. . . . I knew a boy named Wegman. His duties were to run the pre-heater and the evaporators. I employed him for that purpose. We ran a preliminary test of the pre-heaters about a month previous to that. Mr. Lippert was there at the time. It was tested more for leaks and things of that kind and to ascertain if the lines were all in good order. So far as I know it was not subjected to a water-pressure test. There is

a way to test the pressure as to what a cast-iron head should withstand—the hydrostatic test. That is the only way unless you put the steam pressure on. You are liable to blow up anything in testing with steam. . . . I did not, nor as far as I know did anyone else, tell Mr. Lippert at what to fix the safety valves on the pre-heater. That safety valve [referring to diagram] was to be set by my instructions to Mr. Lippert to carry not over twenty-five pounds. Those instructions were given verbally. Besides that, Mr. Lippert made a special safety valve and put it in farther on the other line. I never ran the pre-heater. It was practically a new apparatus to me. There was no test of the pre-heater made while I was employed by the company. . . . On the day this accident occurred the evaporators had just been started up—Mr. Lippert started them up himself. Mr. Wegman was there and Mr. Lippert was instructing him. This was the first day and the juice had just got started there. I employed Mr. Wegman. I don't think he had had any previous experience in that line. I had not given him any instructions so far. I told him what his duties were when I employed him. We hired him for the evaporator. . . . When the accident occurred I should judge I was about twenty-five feet from the pre-heater. All that I saw was steam. Just at the time when I was coming around the corner I saw Mr. Lippert reach up and get hold of the wheel—there was a wheel that was connected through to the steam valve supplying steam to the pre-heater." On cross-examination witness said: "When I wanted information respecting the working of the machinery or the condition of it in the house I would go to Mr. Lippert. I had no technical knowledge of it at all, but resorted to Mr. Lippert for information concerning the technical points of the machinery. . . . Mr. Lippert told me that he knew all about the pre-heater, as he helped to build it and tested it the previous year. That was about the synopsis of it. He always said that he was afraid of the pre-heater, because he said some day the thing would blow up."

The deposition of John Wegman, taken on behalf of plaintiffs, was read in evidence. He deposed as follows: "I will be eighteen years of age the ninth day of August, 1911. I reside in Visalia and am now working in an automobile shop. I was working in the sugar factory at Visalia and Mr. Sieiland, the superintendent, sent me down to Corcoran. There

I was introduced to Mr. Connolly, the superintendent, who sent me to Mr. Williams, the beet end foreman. Mr. Williams showed me the next day the different valves on the evaporators and pre-heater." Witness described the machinery and continued: "This pre-heater had valves on it. There was one valve I know to leave the steam in, that ran down towards the front end of it. Mr. Lippert had his hand on it. It is made of iron and had an iron wheel on the end. The wheel was blown off at the time of the explosion. . . . There was a safety valve on top of the pre-heater. I don't know what its use was. I don't know about the uses of the pipes in the pre-heater nor how it operated. . . . When I went to work at the sugar factory the work I was to do was to run the evaporators and the pre-heater. Mr. Williams he came around and gave me orders and showed me all the valves. Mr. Williams told me how to start them up and told me about the different valves and told me how much steam to carry on the evaporators. He told me to carry five or six pounds on the first evaporator and the next evaporator I don't know just exactly what he told me, nor do I remember now what he told me to carry in the pre-heater. I had never seen nor operated a pre-heater before. We had started up the pre-heater the morning of the day Mr. Lippert was killed. We got the evaporators hot and full of juice and it was just getting started. When the accident occurred and Mr. Lippert was killed he had hold of the valve and I was right off to one side of them. He had hold of the valve that you turn the steam in with into the pre-heater. I stood there for a second, not more than a second and then I started away and just as I started away, the pre-heater blew out. While I was standing there those couple of seconds I noticed the steam gauge on the pre-heater. It registered about twenty-three pounds. I don't know who turned the steam into that pre-heater; Mr. Lippert had hold of the valve at that time; that is all I know. . . . Q. Did you have any conversation at all with Mr. Lippert in regard to that pre-heater? A. No, sir; I never had no conversation with him at all. He just come around and asked me how things were running. At the time I stood those couple seconds and looked at the steam gauge, I noticed the pre-heater steam head was leaking a little bit, a little around the bolts." The witness stated that the mechanics had screwed up the bolts; that the bolts did not give way, but

that the sheet of iron that covers the pre-heater blew out. At the time of the explosion he was about a foot and a half away from the pre-heater and received an injury on his wrist. He did not know at what pressure the safety valve was set and did not remember what amount of steam he was supposed to carry in the pre-heater.

M. B. Kearney was recalled and gave further details of what occurred at the time of the accident, and James Mack Hale was also sworn as a witness for plaintiffs and testified to facts similar to those given by other witnesses.

R. S. Bulla, connected with beet-sugar factories since 1890, part of the time as superintendent, testified on behalf of defendant. He described the operation of evaporators and pre-heaters, although he said the pre-heater at the Corcoran plant was the only one he had ever seen. He said: "A boy of sixteen years is perfectly able to watch the system of four evaporators and one pre-heater and to observe the steam and juice level in each one. . . . The master mechanic is master of the mechanical department. It is his duty to regulate the steam pressure on the evaporators. By regulating the evaporators, I mean the setting of the relief valves and giving the evaporator-man in charge those instructions of how far and how high the steam pressure might rise, and in regulating the reducing valves and allowing no more steam in than he considers, in his opinion as an engineer, is safe for the machine."

G. D. Kiefer, a witness for defendant, testified: "I reside at Corcoran, where I have lived for almost five years. My trade is that of a machinist. I went to work for the Corcoran sugar factory on the 4th of March, 1908. . . . Mr. Lippert was master mechanic there, in which capacity I have had conferences with him. . . . At the time of the explosion I was probably fifteen or twenty feet from the pre-heater—within a few minutes before the explosion. I could see the pre-heater from where I was. Just before the explosion Mr. Lippert and I sat on the water line. We talked about the pre-heater. I wanted him at that time to cut it off; I told him that it was a detriment and no use to the factory. He said that the machinery was put there to run, and he was going to run it; we came back in around the pre-heater and steam was coming out through the bolt holes on the south end of it. Mr. Lippert called Mr. Connolly; Mr. Connolly had been talk-

ing to Mr. Wegman whom he had at that time been showing how to run the evaporator. Mr. Connolly came over and spoke to Mr. Lippert a few words and I walked back. . . . Then Mr. Lippert started to working with the wheel of the long valve that leads to the main steam line, as I understand it. I turned around and left the factory, or attempted to. I left because I did not think it was policy to stay around. I was afraid of it. The steam was issuing from the steam chest then. . . . The only thing Mr. Lippert said at that time was that he was afraid to start the pre-heater. I had talked with him before that. He said that he did not believe that the steam lines were connected up properly. He said he thought that the steam lines could be fixed so they would work—that he was going to try to run them to the pre-heater." On cross-examination witness said: "In the position I held at the time, I was not supposed to know anything about the machinery. My trade is a machinist but I was the yard man there, I had control of the yard. If anything happened to the machinery out there I went to Mr. Lippert. Mr. Lippert had entire charge of the machinery part of the factory."

Upon the close of plaintiffs' case, defendant moved for a nonsuit on the grounds: 1. That no negligence on the part of defendant has been shown; 2. Deceased was guilty of contributory negligence; 3. Deceased assumed the risk of the employment. The court denied the motion for nonsuit.

In Shearman and Redfield on Negligence, section 60, the following rule is declared: "Where a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." In *Rose v. Stephens etc. Co.*, 11 Fed. 438, it is said: "In the present case the boiler which exploded was in the control of the employees of the defendant. As boilers do not usually explode when they are in a safe condition, and are properly managed, the inference that this boiler was not in a safe condition or was not properly managed, was justifiable." It was further said that, while the rule is more frequently applied in cases against carriers of passengers than in any other class, there is no foundation for limiting the rule to carriers. "The presumption," said the court, "origi-

nates from the nature of the act, and not from the nature of the relations between the parties."

The cases are industriously cited and considered in *Judson v. Giant Powder Co.*, 107 Cal. 549, [48 Am. St. Rep. 146, 29 L. R. A. 718, 40 Pac. 1020]. Referring to the case of *Young v. Bransford*, 12 Lea (Tenn.), 232, which supports a contrary doctrine, attention is called to the following language in the reported opinion of that case: "At the same time the fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace: 'That from the mere fact of an explosion it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the boiler, or some defect in its condition.' " We are satisfied that this is a case where the doctrine of *res ipsa loquitur* is applicable, and plaintiffs are not precluded from relying upon it because they charged specific omissions of duties or acts of negligence. This latter proposition is well supported in *Cassady v. Old Colony Street Ry. Co.*, 184 Mass. 156, [63 L. R. A. 285, 68 N. E. 10], where it was said: "The defendant also contends that even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine (*res ipsa loquitur*), because, instead of resting her case solely upon it, she undertook to go further, and show particularly the cause of the accident. This position is not tenable. It is true that, where the evidence shows the precise cause of the accident, as in *Winship v. New York, N. H. & H. R. Co.*, 170 Mass. 464, [49 N. E. 647], and similar cases, there is, of course, no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been as to it if it had not been shown. But if, at the close of the evidence, the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon presumptions, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it."

Plaintiffs may therefore rely on the presumption of defendant's negligence although they endeavored, as did defendant, "to show particularly the cause of the accident."

Deceased was shown to have been competent "to be there as the engineer, to take charge of the mechanical part of the house," for which purpose he was employed, as a witness testified. He had a general knowledge of the plant and the machinery there in use, for he helped to install some of it. It was not, however, a part of his duty personally to operate the different machines of the plant or any one of them. Other persons were in personal charge of their operation. The evaporators, including the pre-heater, the explosion of which caused the death of Lippert, were, by Superintendent Connolly, placed in charge of the boy, Wegman, less than sixteen years old. Wegman was told by Connolly to report to Williams, the beet foreman, for instructions how to run the pre-heater, and Wegman testified that no instructions were given him by deceased and that all he had were given by Williams to whom Superintendent Connolly sent him. He testified: "Williams, he came around and gave me orders and showed me all the valves. Mr. Williams told me how to start them up and told me about the different valves and told me how much steam to carry on the evaporators." Wegman could not remember what his instructions were as to the pressure he was to carry in the pre-heater. This was quite an important fact for Wegman to know, and as he had no knowledge except as he got it from Williams, and as Connolly sent him to Williams, it is fair to presume that Williams had the information given in the superintendent's written instruction that "the pre-heater is supposed to carry the full seventy pounds on steam end," and so instructed Wegman. Connolly testified that there were six copies made of these instructions, and they show on their face that they were intended for the information of the foreman of the different departments of the plant. Wegman testified that he "had never seen nor operated a pre-heater before." Witness Bulla testified that "a boy of sixteen years is perfectly able to watch the system of four evaporators and one pre-heater and to observe the steam and juice level to each one." The jury were informed in great detail by witnesses as to the component parts of the plant, and their several offices and illustrative diagrams were used to aid in the explanation. We think,

with the information placed before them, they were as well qualified to form an opinion of Wegman's competency as was the witness Bulla. How far the immaturity in years or the ignorance of Wegman contributed to the explosion of the boiler was a matter for the jury to determine under all the facts and circumstances. He testified that a second or two before the explosion he had been standing near the pre-heater and noticed that the steam gauge registered twenty-three pounds. Connolly testified that a few minutes before the explosion he was around there and "noticed a pressure of a little over twenty pounds on the steam end." Witness Kearney, a steam-fitter, employed by defendant, was sent by Lippert to tighten up some bolts around the steam-head that were leaking. He gave, in his testimony, a very complete description of the pre-heater. He testified that Lippert came to where he was working and told him to take his helper and go to the pre-heater as it was leaking slightly; that he went to the boiler with his helper; that Wegman was there, whose duty was "to see that the steam gauges were kept at a certain stage"; that Williams was there also; that he, the witness, and his helper, tightened up the bolts where the leak mostly was and after tightening up the bolts he "looked up at the steam gauge and saw it registered in the neighborhood of forty-seven pounds"; he "turned to Williams [who was Wegman's instructor], the beet foreman, and said: 'How much steam do you generally carry in that pre-heater?'" He looked up at the gauge and said: "That's right." Thereupon Kearney and his helper left, Kearney remarking to his helper: "Pack up your tools and let's get out of here." He testified that they had walked over to the machine-shop where they had been working, a distance of fifty or seventy-five feet, when the explosion occurred. He immediately returned and found Lippert in the pit close to the boiler, where he died in about ten minutes. Lippert was not at the boiler when Kearney was tightening the bolts and when Kearney spoke to Williams, but he seems to have returned to the heater during these few seconds and about all we can learn from the testimony is, as testified by Wegman: "He [Lippert] had hold of the valve that you turn the steam in with into the pre-heater." Williams did not testify at the trial. Wegman's testimony was that the steam gauge read twenty-three pounds, but against this is the testimony of Kearney, a steam-

fitter, who had called Williams' attention to the fact that the gauge showed forty-seven pounds, and seems to have hastened to get away, although Williams replied: "That's right." The machinery had been tested before "starting up," and apparently all the parts were in working order. Lippert did not live to explain what he intended to do when he took hold of the valve that controlled the intake of steam to the heater. Under the circumstances the only reasonable conjecture that can be indulged is that with steam escaping around the bolt-heads and somewhat around the edges of the boiler-head, as the testimony showed was occurring, he would naturally endeavor to shut off the pressure. But it was too late. At that second, according to Wegman's testimony, the explosion occurred. We think the jury were justified from the evidence in finding that Williams and Wegman allowed the steam pressure to reach forty-seven pounds, which was seven pounds more than the maximum "working pressure" which the maker of the pre-heater had stipulated it was to stand. Superintendent Connolly admitted that he gave the written instructions which allowed a pressure of seventy pounds. In his testimony he seems to have sought to make Lippert equally responsible for the instructions. He did not testify, however, that Lippert knew anything about the contract between defendant and the maker of the boiler; nor did he testify that Lippert had anything to do with formulating that part of the instructions relating to the pressure. He at first testified that no instructions were given to Lippert upon this point. When confronted with the written instructions he admitted that they were in his handwriting and were given to Lippert before the campaign started, and added: "Mr. Lippert and I got those instructions up ourselves." Lippert knowing nothing of the specifications made by the boiler-maker and Connolly knowing what they were, it is not at all likely that Lippert fixed or had anything to do in stating the pressure which the pre-heater would withstand. Connolly testified that he called Lippert's attention to the safety valve, that it "was apt to stick occasionally," but he did not know that it stuck that day, and there was no evidence that it was out of order. He testified that "the safety valve [referring to diagram] was to be set by my instructions to Mr. Lippert to carry not over twenty-five pounds. Those instructions were given verbally." He also testified that Lippert in-

structed Wegman. Wegman testified that all the instructions he received were given by Williams to whom Connolly sent him. We do not think the jury were compelled to accept at its face value the testimony of Connolly as to verbal instructions or conversations with Lippert, who being dead could not explain or refute them. Connolly may not intentionally have misstated any fact, but his memory may have been at fault. Evidence of alleged declarations of deceased persons is always more or less unsatisfactory, and the unsupported testimony of a single person as to a conversation between himself and a deceased person is regarded as the weakest of all kinds of evidence. (*Mattingly v. Pennie*, 105 Cal. 514, [45 Am. St. Rep. 87, 39 Pac. 200]; *Austin v. Wilcoxson*, 149 Cal. 24, [84 Pac. 417].)

Connolly's connection with the accident and the responsibility resting upon him in a greater or less degree for the unfortunate accident justifies classing him as a hostile witness, although circumstances compelled plaintiffs to call him as a witness to establish certain facts.

Recurring to the grounds for a reversal of the judgment, as stated by defendant in its brief, it may be conceded as proven that deceased "was intrusted with the oversight of all the machinery of the sugar-house," but it does not follow that "he assumed all the risks attending his employment." There was no evidence that the pre-heater was out of repair, or that there was any imperfection in it calling for repair or complaint to defendant, or that it was not in thorough running condition. In fact, it was not an indispensable part of the plant, for Connolly testified that defendant dispensed with it altogether after the accident. No reasonable cause for the explosion can be assigned, based upon any evidence, other than it was caused by an excessive pressure of steam to which the pre-heater was subjected by the employee of defendant, whose duty, under the authority of defendant, it was to operate this machine. There was evidence that this employee was performing this duty under the immediate instructions of Williams, and not under the direction of Lippert at the time the explosion occurred. If Williams was governed by or had in mind the written instructions, which we think must be presumed, he may not have been at fault, but surely defendant was in giving them, and the responsibility thus passed to defendant for the accident.

We can see no ground for sustaining defendant's contention that the explosion was caused by Lippert's contributory negligence. He, too, was authorized to assume that the pre-heater would withstand seventy pounds pressure, nearly double its actual maximum resisting capacity. Considering all the facts and circumstances, the primary cause of the accident seems more reasonably traceable to the erroneous instructions given by the superintendent upon a very vital matter than to any other cause, and for this defendant alone is responsible. But if from all the evidence no reasonable explanation of the accident, acquitting defendant of blame, was shown, the verdict and judgment may rest upon the presumption of defendant's negligence.

In its opening brief the specifications of errors called to our attention are, in substance, that the court erred in not granting defendant's motion for nonsuit on the ground of the insufficiency of the evidence and the refusal of the court to instruct the jury to return a verdict for defendant. Also on the ground that the court permitted plaintiffs to amend their complaint at the conclusion of the evidence for plaintiffs by charging defendant with culpability in the selection of an incapable employee, to wit, John Wegman. There is also a general specification of the insufficiency of the evidence in certain particulars. We do not think the court would have been justified in granting the motion for a nonsuit nor in directing a verdict for defendant. There was sufficient evidence to sustain the verdict and judgment. In allowing plaintiffs to amend their complaint, the court was exercising a discretion confided to it, the abuse of which alone could justify reversal. The ruling of the court did not carry with it an implication that Wegman was in fact incompetent to perform the duties assigned to him. The implication was that there was sufficient support in the evidence on the point to go to the jury for determination.

The judgment and order are affirmed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 10, 1917.

[Civ. No. 1622. Third Appellate District.—March 12, 1917.]

PALO ALTO MUTUAL BUILDING AND LOAN ASSOCIATION (a Corporation), Respondent, v. **FIRST NATIONAL BANK OF PALO ALTO** (a Corporation), Appellant.

BUILDING AND LOAN ASSOCIATION—INDORSEMENT OF CHECK BY SECRETARY—LACK OF AUTHORITY—APPROPRIATION OF PROCEEDS—LIABILITY OF BANK.—The secretary of a building and loan association has no authority by virtue of his office to indorse and cash a check payable to the association for his own benefit, and where he does so, and is without express authority, the bank cashing the check is liable to the association for the amount thereof.

ID.—USE OF CORPORATE PROPERTY BY OFFICER—NOTICE OF LACK OF AUTHORITY.—An officer of a corporation has no authority to use the corporate property for his own benefit, and such use is notice of lack of authority.

ID.—PRINCIPAL AND AGENT—KNOWLEDGE OF AGENT—WHEN NOT IMPUTABLE TO PRINCIPAL.—A principal is not charged with knowledge of his agent where the latter is engaged in a transaction beyond his authority, and in which he is interested adversely to the principal.

ID.—DOCTRINE OF BONA FIDE HOLDER INAPPLICABLE.—Where the secretary of a building and loan association without authority indorses a check payable to the association to a bank, the doctrine of *bona fide* holder without notice does not apply as between the association and the bank, for they are parties in privity; nor is the bank an indorsee in due course as defined by sections 3123 and 3124 of the Civil Code.

ID.—USE OF PROCEEDS OF CHECK—BENEFIT OF ASSOCIATION—LACK OF ESTOPPEL.—The fact that the association suffered no loss by reason of the fact that the money obtained from the cashing of the check was used to secure title to property upon which the association held a mortgage does not estop the association from recovering the amount of the check from the bank.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Green, Humphreys & Green, for Appellant.

J. S. Hutchinson, Cushing & Cushing, and Walter Slack, for Respondent.

BURNETT, J.—The suit is for the conversion of a check for seven thousand five hundred dollars and the proceeds thereof. The answer denies the conversion and sets up the special defense that plaintiff discounted and cashed the check at defendant's bank, that the money was appropriated for the benefit of plaintiff, and that the demand in suit has been paid. Respondent is a building and loan association and appellant a national bank, both doing business in Palo Alto. Appellant was not the bank of deposit of respondent, the banking business of the latter being done at the Bank of Palo Alto. One Marshall Black was the secretary of respondent but held no other position therein. Appellant bank was located in the same block as respondent's place of business, while the Bank of Palo Alto was three blocks distant. Plaintiff's ownership of the check was admitted by the pleadings, said check being in the following form:

“\$7500.

“Daniel Meyer San Francisco, Cal. May 5 1910 No. 1601

“The Anglo & London Paris National Bank of San Francisco

“Pay to the order of Palo Alto M B & L Ass'n \$7500 00/100
Seventy five hundred 00/100 dollars

“DANIEL MEYER.”

Black indorsed the check as follows: “Pay to the order of First National Bank Palo Alto Mut Bld & Loan By Marshall Black, Secretary,” and delivered it to appellant. At that time two deeds respectively from Annie MacIntyre and Alexander MacIntyre to Black, covering a tract of land in Palo Alto, were on deposit in escrow with appellant to be delivered to Black on the payment of \$7,366.40. Appellant received the check so indorsed and delivered without the actual knowledge of respondent, and applied the proceeds as follows: It credited the account of Alexander MacIntyre at the bank with the sum of \$2,755.25 and applied \$4,611.15 on a promissory note then due from MacIntyre to appellant, thus paying the note. Of the former amount it remitted MacIntyre \$2,366 in cash and applied what remained apparently to an overdraft due from MacIntyre to itself. The balance of \$133.60 it paid to Black in cash. It then delivered said deeds to Black, who thus acquired title to said property. Prior to March, 1910, Black had organized a corporation known as the “Marshall Black Investment Company,” of which he was the president and manager, and owned practically all the stock.

On March 22, 1910, the Investment Company, through Black, applied to respondent for a loan of seven thousand five hundred dollars upon the security of said land standing then in the name of the MacIntyres. The application for the loan was approved, the money advanced, and Black, on receiving the deeds from the MacIntyres, conveyed the property to said Investment Company, which had executed a mortgage on the property to respondent for the said sum of seven thousand five hundred dollars.

On November 29, 1911, the Investment Company, in consequence of the release of the mortgage and other considerations, executed to the San Jose Abstract Company, as trustee for the benefit of respondent, a trust deed covering said property as security for said indebtedness to respondent. The sum secured thereby was eight thousand five hundred dollars, value actually received by said company, and, until September, 1912, respondent had no knowledge of the misappropriation of the separate and independent sum of seven thousand five hundred dollars covered by the check involved herein. About this time it became known that Black was a defaulter to the extent of over one hundred thousand dollars, and the facts concerning the transaction between him and appellant, as to said check, came to light. On account of said defalcation the building and loan commission of the state compelled respondent, pending investigation as to its financial condition, to suspend business. The suspension continued from October 1, 1912, to December 14, 1912, when, after the adoption of a plan of reorganization of the finances by the directors and stockholders in compliance with the demand of said commissioner, the association was permitted to resume business. This plan is fully set forth in the findings, and it amounted substantially to a sufficient reduction in the value of the stock of the stockholders to cover the deficit caused by Black's defalcations, thus making it appear that the assets of the association equaled its liabilities. In consenting to said plan the board of directors of respondent adopted the following resolution: "Be it further resolved that the acceptance and carrying out of said plan or any charge or entry made pursuant thereto, or otherwise shall not be, or be deemed to be, in any manner a waiver by this corporation of any right it may have to in any manner enforce any claim, liability or obligation whatsoever due from any debtor or party in any

manner involved in or connected with the loss referred to in said plan and generally known as the Marshall Black deficiency." The same resolution was adopted at the stockholders' meeting.

Counsel on both sides have displayed great industry and ability in presenting their views as to the legal propositions involved, and seemingly have exhausted about all the learning on the subject. The discussion has, indeed, taken a wide range, and we cannot within reasonable limits follow it in all its ramifications.

We think the contentions of appellant have been satisfactorily answered in the brief of respondent, and as far as specific attention is paid to them we shall probably do little more than present a synopsis of the argument contained in said brief.

As to the authority of Marshall Black to represent respondent, upon which appellant lays much stress, the court found as follows: "That at all times mentioned in said complaint and for several years immediately prior to May 6, 1910, one Marshall Black was the secretary of plaintiff, but did not hold any other office in the said plaintiff, and was not a director thereof. That during all of said time the business of plaintiff was managed and controlled by a board of directors, and said Marshall Black (as such secretary) had charge of the business of said plaintiff corporation, subject to the control and supervision of the board of directors of plaintiff, except as otherwise found herein." There is abundant evidence for the support of this finding, notwithstanding appellant's contention that Black was literally in control of the business, that he was permitted to handle the business of the association as he saw fit, and that the directors took no part in its management and never examined its books and records. Appellant makes a common mistake, to which we have had occasion before to advert, in that it has directed attention to evidence opposed to said finding but has ignored what is favorable thereto. Respondent calls attention to some twenty matters of importance in the business of the association which had been directed and supervised by the board, as shown by the evidence. These we need not enumerate, but they are sufficient to justify the conclusion of the court, and they certainly negative the claim that the board abdicated its authority and abandoned its functions to be exercised by Black.

We think it can safely be said that the association was actually under the supervision and control of said board, and that Black was authorized to discharge only the duties that usually belong to the office which he held, although we could not affirm with much confidence that said board of directors "were particularly vigilant and active in guiding its affairs." Like many other similar boards, they were disposed to withhold their personal individual attention from the exercise of the duties of the secretary in the business of the concern, believing, no doubt, that these matters could and would receive effective consideration from said officer. If the directors had been as active and vigilant as they should, it is quite probable that the rascality of Black would have been discovered much earlier, to the great advantage of the association and its stock-holders. It is but a truism to say that directors of such organizations generally confide too much in the honesty of their ministerial officers, and are too prone to delegate to the latter services which should be performed or personally supervised by the directors themselves. The misplaced confidence in an unworthy agent herein disclosed finds many a parallel in the history of such organizations, and the serious and deplorable consequences of such confidence should be a lesson to those charged with the duty of managing these important concerns involving the interests of those ill prepared to experience financial loss.

However, in the apparent remissness of the directors herein we find no comfort for appellant nor warrant for its claim that any loss occasioned by this particular transaction is chargeable to their negligence.

Another finding of which complaint is made is the following: "That on various occasions prior to May 6, 1910, Marshall Black, as a matter of convenience in operating the office of said plaintiff, did from time to time cash some checks or drafts payable to the order of said plaintiff at the office of said defendant. . . . That none of the checks so cashed amounted to a greater sum than five hundred dollars, excepting one check, the transaction involved in the cashing of which is now in controversy and litigation, and the acts of said Marshall Black in cashing said checks were not, nor was any thereof, brought to the knowledge of plaintiff corporation, its officers or directors, and neither the said plaintiff corporation, nor its officers or directors, other than said Mar-

shall Black, had any knowledge thereof, and said Marshall Black never communicated the fact of the cashing thereof to plaintiff. That the discounting or cashing of notes, drafts or bills of exchange by said Marshall Black with defendant was carried on under the circumstances as herein stated and not otherwise and never became nor was at any time nor at all an established or any practice or custom. That said corporation plaintiff never at any time or at all, either directly or indirectly, ratified or acquiesced in, or confirmed or approved the said acts of said Marshall Black in cashing said checks or drafts. That neither the articles of incorporation, nor the by-laws of said plaintiff, ever at any time or at all authorized or empowered said Marshall Black or any other person as such secretary or otherwise, or at all, to cash or discount checks or drafts or bills of exchange for any purpose whatever or otherwise, or at all."

We think there is no ground for the contention that this finding in any respect is unsupported. There may be evidence in the record that would warrant a contrary finding as to some of the facts enumerated, but of course that is of no consequence here. Respondent calls attention to the specific portions of the transcript wherein is found testimony in harmony with the views of the court as thus expressed, but it is not deemed necessary to set it forth herein.

We are of the opinion that there is no more merit in the objection to the finding as to the payment of seven thousand five hundred dollars as a loan to the Investment Company. There was undoubtedly an irregularity in advancing the money before the loan was approved by the board and before the notification by the attorney that all legal requirements had been complied with, but the irregularity was cured by the subsequent approval and ratification of the loan by the directors. In fact, it seems to have been approved a second time on May 10, 1910, four days after the deed to the property came into the possession of plaintiff. Aside from that, it must be true that the borrower who actually obtained the loan could not object to any irregularity in the proceedings whereby he secured it, and, of course, appellant is in no better position to complain.

The trust deed given in place of said mortgage and in release thereof was to secure the payment of eight thousand five hundred dollars. This included the amount of one thousand

dollars in interest, and we can see no possible reason for an objection to this any more than to the principal of the indebtedness. Manifestly, they stand upon the same footing as to the consideration for the security.

We can perceive no merit in the claim that "the liability of respondent arising out of Black's defalcations have been paid, satisfied, and canceled as shown by the 'Marshall Black Deficiency Account.'" It is quite apparent that there was no actual payment to respondent of the proceeds of said seven thousand five hundred dollar check. We have already detailed the disposition that was made of the money. There is nothing to show that any part of it ever came into the possession of respondent, or that the loss by reason of the misappropriation of the fund was ever made good either entirely or partially. It is equally plain, from the resolution passed as aforesaid by the directors and the stockholders, that there was no intention, by reason of said deficiency account or otherwise, to satisfy and cancel said obligation. The actual loss by reason of the defalcations of Black was over one hundred thousand dollars, but, in order to satisfy the building and loan commission and to secure permission to resume business, it seems that the capital stock, reserve fund, undivided profits, etc., were reduced or written down to the extent of the loss. This, as stated by respondent, was a matter of book-keeping and adjustment of the various accounts to satisfy the said commission that the concern was solvent and entitled to do business; or, in other words, the large sums credited to said deficiency account were simply written off the value of the stockholdings. We can see nothing in the transaction that should be construed as operative to extinguish respondent's claim to compensation for the conversion of said check. The amount received, as we understand it, although nominally for the corporation is actually for the benefit of the stockholders who have suffered the loss.

In this connection, it may be said that we view similarly the contention that the amount received on Black's bond should be credited *pro rata* on this claim. The question is really one of subrogation which concerns only respondent and the Surety Company.

Thus far there seems but little room for debate, but some other points made by appellant probably possess more merit.

The question of agency in its various aspects has received much attention, and it is claimed that in accordance with its well-established principles the act of Black in cashing the check must be regarded as the act of respondent. We do not so understand the law and the facts.

It is plain that Black had no express authority to indorse the check, and this has already been sufficiently considered. It is also true that he had no such authority simply by virtue of his office as secretary. (*Blood v. Marcuse*, 38 Cal. 590, [99 Am. Dec. 435]; 3 Cook on Corporations, 6th ed., sec. 717.)

Likewise it must be admitted that in the absence of authority, express or implied, he cannot transfer his principal's property, and such authority will not be presumed. (*Read v. Buffum*, 79 Cal. 77, [12 Am. St. Rep. 131, 21 Pac. 555]; *California Winemakers' Corp. v. Sciaroni*, 139 Cal. 277, [72 Pac. 990].) Beyond that, an officer of a corporation can have no authority to use the corporate property for his own benefit, and such use is notice of lack of authority. (Civ. Code, secs. 2230, 2234, 2306, 2322.) Directors and officers of corporations are agents and trustees within the contemplation of these sections of the code. (*Graves v. Mono Lake etc. Mining Co.*, 81 Cal. 303, 319, [22 Pac. 665]; *Pacific Vinegar & Pickle Works v. Smith*, 145 Cal. 363, [104 Am. St. Rep. 42, 78 Pac. 550].)

In relation to this question some interesting cases are reviewed by respondent.

In *Hubback v. Ross*, 96 Cal. 426, [31 Pac. 353], one Makin desired to obtain money from plaintiff in connection with certain shipments and plaintiff drew bills of exchange upon his correspondents in Liverpool and delivered them to Makin. Plaintiff demanded security of Makin and the latter presented a deed from Ann S. Ross to plaintiff conveying certain property. Makin delivered the deed for the bills of exchange running to himself. The action was brought to foreclose the deed as a mortgage and defendant denied that it was given for the purpose declared by plaintiff. The latter claimed that Makin being intrusted with the conveyance had at least apparent authority to deliver it for the purpose of securing his personal obligation, but it was held that the apparent authority was limited, by one of the fundamental principles of agency, to the right to deliver it only as a security for some obligation of his principal, and, further, that plaintiff was not

justified, as a matter of ordinary prudence, in presuming that Makin might use the instrument for his own benefit and purpose.

In the Smith case, *supra*, the court had under consideration the indorsement of a corporate obligation by the president of a company to himself. Therein it is said: "It is hardly necessary to say that the general power conferred upon Smith under the by-laws did not give him authority to contract with himself. In every case where the validity of a contract made by a trustee with himself is in question, general authority to act for the corporation must necessarily have existed in order to apply the principle invoked here. The law assumes that the trustee is invested with general power to contract, but limits its exercise to matters strictly in the interest of the beneficiary, and disqualifies him from exercising it in his own behalf. This disability directly results from the existence of the general authority."

The same rule is enforced in the late case of *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, [135 Pac. 496], wherein, in reference to the president of plaintiff, it is said: "It is universally held as a consequence of this doctrine that he may not on behalf of the corporation contract with himself as an individual, which of course includes contracting with others with whom he has an interest, without the full knowledge and approval of the corporation."

Among the many cases cited from other states we refer only to *Ward v. City Trust Co. of New York*, 192 N. Y. 61, [84 N. E. 585]. Therein, it seems, certain officers of Hartman Manufacturing Company obtained a check for one hundred and twenty-five thousand dollars from Hanover Bank, payable to the order of Hartman Company, by falsely representing that the loan was secured for said company. One of these officers indorsed the check in the name of Hartman Company by himself as president and general manager, and delivered it to the City Trust Company in payment of his personal note. The referee in the lower court found that the defendant Trust Company acted in good faith and concluded that it was a *bona fide* holder for value. The court of appeals reversed this decision, holding that the defendant was not justified in taking the check for the personal obligation of the president, and that it could not be a *bona fide* holder of the obligation. Therein it is said: "The form of

the check in question was notice to the trust company that Umsted was using the property of the corporation of which he was president to pay the personal debt of himself and Kiefer in apparent violation of its rights. . . . The effect of such notice was to put the trust company upon inquiry to see whether it was about to accept money from one to whom it did not belong in payment of its own claim. The presumption arising from the face of the check was that it belonged to the Hartman Company, and that its president had no right to use it to pay his personal debt." It was also held that the broad power conferred upon the president of the corporation was not sufficient to authorize him to give away the assets of the company or to use them to pay the personal debts of its officers. Emphasis is laid upon the proposition that by reason of the fact that the check showed upon its face that it belonged not to Umsted or Kiefer but to the Hartman Company, there was a "shadow" upon it, and the defendant could not in good faith accept it until the shadow had been removed. It is declared that "While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or implied, which amounts to bad faith, when regarded from a commercial standpoint." Of course, it is true, as pointed out in the decision, that if reasonable inquiry would have led to the discovery of facts which would have dispelled any suspicion, the purchaser of the paper is entitled to the benefit thereof as if he had made proper investigation. That is self-evident, being equivalent to saying that if the agent had ample authority in the premises, the want of knowledge thereof by the purchaser would not invalidate the transaction. Manifestly, it is only in the case where the agent lacks authority that the principal may exact the duty of inquiry and that the failure to inquire imposes a penalty upon the purchaser.

The Ward case, *supra*, substantially covers most of the principles of law involved herein, but we append the other cited cases as instructive on the subject: *M. Jacoby & Co. v. Payson*, 85 Hun, 367, [32 N. Y. Supp. 1032]; *Knoxville Water Co. v. East Tennessee Nat. Bank*, 123 Tenn. 364, [131 S. W. 447]; *Germania Safety-Vault & Trust Co. v. Boynton*, 71 Fed. 797, [19 C. C. A. 118]; *Claffin v. Farmers & Citi-*

zens' Bank, 25 N. Y. 293; *Robinson v. Chemical National Bank*, 86 N. Y. 404; *Bank of New York N. B. A. v. American Dock & Trust Co.*, 143 N. Y. 559, [38 N. E. 713]; and also *Randolph on Commercial Paper*, sec. 368, and *Thompson on Corporations*, sec. 1700.

One feature or incident of agency to which appellant has adverted at considerable length is embraced in the term, "imputation of knowledge to plaintiff." This, however, is nothing but a phase or circumstance of express, implied, or ostensible authority. The knowledge of the agent is considered and imputed as the knowledge of the principal only when the former acquires it in the course of his agency. If he does not acquire it while acting within the scope of his authority, the knowledge is no more to be imputed to the principal than to an utter stranger. The imputation has been held to rest upon the presumption that the agent will communicate such knowledge to his principal. Manifestly, no such presumption can exist where the agent is engaged in a transaction beyond his authority and in which he is interested adversely to his principal or in a scheme to defraud his principal. In *McDonald v. Randall*, 139 Cal. 246, [72 Pac. 997], it was said "a corporation is not chargeable with the knowledge of one of its officers or agents who is acting on his own behalf, and not for the corporation," and in *McKenney v. Ellsworth*, 165 Cal. 326, [132 Pac. 75], the court says: "Where an agent of a corporation is dealing with the corporation in a transaction in his own behalf, it will not be presumed that he will communicate to his principal facts affecting the transaction." An exception is recognized to the rule where the principal is in fact represented in the whole transaction solely by the party as agent. Herein plaintiff was not represented by Black in the matter of the loan to the Investment Company, since he dealt with respondent through its board of directors, its security committee, and attorney. Respondent would not, therefore, be charged with constructive knowledge of Black's misapplication of the fund. But if the presumption existed, it would be a disputable presumption, and the court has found, on sufficient evidence, that the plaintiff had no knowledge of these things. The doctrine manifestly cannot be applied to the extent and end claimed by appellant. The contention resolves itself to this: that the principal, if he has knowledge of the exercise by the agent of certain powers, is

bound by the act of the agent, and he must be held to have such knowledge from the fact that the agent knows of it himself. Such doctrine, of course, could not be maintained, as it would place it within the power of an agent to bind the principal to any course of conduct however foreign or obnoxious to the authority actually conferred.

There is no doubt that the circumstances might be such as to estop the principal from denying the authority of the agent. That is a familiar principle, but it does not apply here. The acts of the agent may be so open and frequent as to create and compel the inference of acquiescence on the part of the principal. But they must be acts of a similar nature. Here there is no evidence that Black had before applied the corporate property in substantially the same manner. The elements of ostensible agency to do the thing which was done are entirely lacking, and we can see no reason for invoking the principle contended for that "a corporation is bound by the powers that its agent is permitted to exercise openly."

What has been said, we think, disposes of the contention of appellant that it was a "*bona fide* purchaser for value without notice." It cannot be said to be a purchaser "without notice," since, as we have seen, it was put upon inquiry, and it must be held to know what it could have found out by investigation. In *Smith v. Los Angeles Immigration etc. Assn.*, 78 Cal. 289, [12 Am. St. Rep. 53, 20 Pac. 677], the court says: "The fact that the note appeared upon its face to have been executed by Garey on behalf of the corporation was sufficient to charge his assignee with notice of want of authority to execute it."

In Randolph on Commercial Paper, section 1012, the rule is stated: "In like manner, one cannot become a *bona fide* holder of a check drawn by a bank president on his own bank, and certified by himself, or of a certificate of deposit given by a bank cashier in the name of a bank, and indorsed and deposited by him to his own credit."

And, as pointed out by respondent, the controversy here is between plaintiff, the payee of the check, and appellant as indorsee. They are parties in privity, and, strictly speaking, the said doctrine does not apply as between the immediate parties to the transaction. The rule is stated in Daniels on Negotiable Instruments as follows: "It is a general principle of the law-merchant that, as between the immediate parties

to a negotiable instrument—parties between whom there is a privity—the consideration may be inquired into, and that as to them the only superiority of a bill or note over other unsealed evidences of debt is, that it *prima facie* imports a consideration.”

Nor is the situation changed within the contemplation of sections 3123 and 3124 of the Civil Code, as appellant is not an “indorsee in due course” as therein defined. Among the many authorities as to this point it is sufficient to refer to Judge Cooley’s opinion in the case of *McLellan v. Detroit File Works*, 56 Mich. 579, [23 N. W. 321], where a partnership had issued promissory notes and thereafter transferred its property to the corporation which assumed certain indebtedness, excluding, however, the notes of plaintiff. The president of the corporation, though, renewed the notes to plaintiff by giving him corporation notes. It was said: “The case was such that the plaintiff must be deemed to have accepted renewal of the notes with knowledge of all the facts. They held partnership notes, and they accepted corporation notes in renewal; and they must be deemed to have known that an officer of a corporation can have no general authority to give the notes of the corporation to take up the outstanding obligations of members. Special authority would be required to empower him to do so; and those persons who should venture to take such notes from him must, at their peril, ascertain that the special authority has been conferred.” Furthermore, it was declared that “a corporate note given for an individual obligation is not given in the regular course of business, but, presumptively, is *ultra vires*. An officer of a corporation can never have implied authority to give such notes. . . . The general authority to make commercial paper in the name of a corporation is given to be exercised for the benefit and in the business of the corporation, not for the benefit or in the business of others, and it is therefore obvious that one who takes such paper with knowledge that it is not given for a corporate purpose can have no claim to the protection which the law accords to a *bona fide* holder.”

Another point made by appellant, worthy, probably, of some notice, is that respondent suffered no loss by reason of the fact that the money was used to secure title to the property upon which respondent had a mortgage for seven thou-

sand five hundred dollars. The contention seems to be that if the proceeds of said check had not been applied to the purchase of said property, respondent would have lost the seven thousand five hundred dollars which it had already loaned on the strength of the security. However, there does not appear to be merit in the defense that if the seven thousand five hundred dollars had not been misappropriated another equal amount would have been lost. A thief who admits a theft and his use of the money for his individual benefit could hardly find justification or excuse in the plea that by his unwarranted use of the money he saved the owner the loss of another similar amount. Respondent was entitled to the security and also the proceeds of the check. Nor does it appear that the additional seven thousand five hundred dollars could have been realized out of the property. The amount of the various encumbrances made in good faith greatly exceeded its value, and while respondent was enabled to secure the repayment of the said sum of eight thousand five hundred dollars covered by the trust deed, there is nothing to show that the other amount misappropriated by Black could have been obtained. Nor can we agree with appellant "that plaintiff cannot retain the advantage derived from the renewal deed of trust executed in 1911, and at the same time insist that such retention does not constitute a ratification of Black's unauthorized act." The doctrine of ratification is gone into pretty thoroughly in the briefs. The principle is reiterated by respondent that it is necessary, in order to effect a ratification, that action be taken with full knowledge of the facts (Civ. Code, sec. 2310; *Hall v. E. W. Wells & Son*, 24 Cal. App. 238, [141 Pac. 53]; *Lambert v. Gerner*, 142 Cal. 399, [76 Pac. 53]), and attention is directed to the fact that when respondent took said renewal and mortgage it had no knowledge of Black's appropriation of the check; hence there was no such ratification.

Again, assuming that respondent was benefited, the situation is covered by the doctrine announced in 2 *Corpus Juris*, section 133, as follows: "Where, however, when the principal first acquires knowledge of the facts, conditions are such that he cannot in justice to himself repudiate the whole of the agent's acts he may stand upon what he has authorized, and the third person must bear the loss resulting from his dealing with an agent without learning the extent of his authority."

Other qualifications of the doctrine are pointed out which lead to the conclusion that by taking said security respondent did not ratify the act of Black or of appellant in said transaction as to the check, but we forego specific mention of them.

We are satisfied that Black had no authority, express or implied, for the indorsement of said check, that no authority, however broad, could have authorized him to cash the check for his own benefit, that appellant was put upon inquiry as to the limit of his authority, and that it must be deemed to have known that he was not acting within the scope of his agency, that appellant converted the property without authority of law, that respondent has not been paid the amount nor any portion thereof, that it is not estopped by reason of having received the benefits of the transaction or otherwise from recovering the proceeds of said check, that it has not ratified the said unauthorized act of Black, and that it has been damaged to the extent claimed by the conduct of appellant in cashing said check.

The judgment and order are therefore affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 10, 1917.

[Crim. No. 655. First Appellate District.—March 15, 1917.]

THE PEOPLE, Respondent, v. FRANK SEARLE,
Appellant.

CRIMINAL LAW — MURDER — VERDICT OF MANSLAUGHTER — ACCIDENTAL DISCHARGE OF GUN.—In a prosecution for murder, a verdict of manslaughter is sufficiently supported by the admissions of the defendant, that at about the time the deceased was wounded a loaded rifle which the defendant was handling was accidentally discharged, and that while on his way for the doctor he went to his cabin, took the rifle and hid it where it was subsequently, and prior to his confession, found by an officer.

ID.—CORPUS DELICTI—SUFFICIENCY OF EVIDENCE.—In such a prosecution the *corpus delicti* is sufficiently proven, independently of the extrajudicial statements of the deceased, by evidence that deceased shortly after a shot was fired was found mortally wounded by a bullet, under circumstances that excluded any inference that the wound was self-inflicted.

ID.—PROOF OF KILLING—PRESUMPTION OF MALICE.—In view of the fact that every killing is unlawful unless expressly excused or justified by law, where a homicide is shown, it is incumbent upon the defendant to prove circumstances in mitigation, excuse, or justification, unless they arise out of the evidence produced against him.

ID.—VIEW OF SCENE OF CRIME BY JURY—PRESENCE OF DEFENDANT—WAIVER.—While a defendant has the right to be present when the scene of the crime is being visited by the jury, he may waive such right, and such a waiver is shown where it is expressly stipulated by counsel that no one need accompany the jury except the sheriff.

APPEAL from a judgment of the Superior Court of Contra Costa County, and from an order denying a new trial.
A. B. McKenzie, Judge.

The facts are stated in the opinion of the court.

A. B. Tinning, and T. H. De Lap, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

KERRIGAN, J.—The defendant was charged in an information by the district attorney of the county of Contra Costa with the crime of murder. He was tried, convicted of manslaughter, and sentenced to imprisonment in the state prison at San Quentin for a term of eight years. The present appeal is from the judgment and from an order denying defendant's motion for a new trial.

Appellant presents but three grounds of appeal, viz., insufficiency of the evidence to support the verdict; that the *corpus delicti* was not proved independently of the extrajudicial admissions of the defendant, and that the view by the jury of the scene of the crime in the absence of the defendant was a violation of his constitutional right.

Dealing with the first point urged, the defendant is alleged to have shot one Patrick Conroy on June 4, 1916. The testimony shows that the deceased was found that afternoon

about 5 o'clock mortally wounded on a ranch in the county mentioned. He and one Joe Hickey, two itinerant laborers, were friends and companions, and had been such for a period of eight years. On the afternoon of said June 4th, walking along the railroad track in the vicinity they came to a small shed on a ranch belonging to one I. T. Coe, which they selected as their resting place for the night. They unrolled their blankets, and Conroy went to get some water at a pump about four hundred feet away from the shed. About five minutes thereafter Hickey heard a shot. He paid little attention to it, but a few minutes later, Conroy not having returned, he proceeded to the pump to look for him, and there found Conroy prone upon the ground with a bullet wound in his head. He immediately ran to the county road close by to summon help, and there met Coe and the defendant. First aid was given to Conroy, and the defendant was sent by Coe, by whom he was employed, to a town a mile away for medical aid. The defendant was a stranger in the county, and at this time had been employed by Coe for about two weeks only. He slept in a cabin some two hundred feet from the pump near which the body of the deceased was found. About a week before the shooting Coe had loaned the defendant a loaded Winchester rifle. About half an hour before Conroy was shot the defendant had left Coe, with whom he had been working repairing a fence, to do the evening chores. Later he returned. During his absence Coe heard the report of a gun, and it was a few minutes after defendant's return to where Coe was still working on the fence that Hickey arrived with the news that his "partner" had been shot. Shortly after the defendant had been dispatched for a doctor, Hickey, who was assisting Coe in his ministrations to the wounded man, caught a glimpse of a man going around the cabin occupied by the defendant. Early the next morning Conroy died. When Hickey announced that his companion had been shot, the defendant (who, it appears, had taken that day several drinks of intoxicating liquor) volunteered the statement that some men or boys had been shooting rabbits in the neighborhood, and that he had heard several gunshots that afternoon—seeking perhaps to convey the inference that Conroy had been shot through the carelessness of hunters. Suspicion attached to the defendant, and he was put under arrest that night. At first he stoutly denied that he had discharged any

gun, or that he had hidden a gun, or even that Coe had loaned him one. Later, however he admitted that a loaded rifle had been borrowed by him from Coe; that at about the time the deceased was wounded while handling the rifle it was accidentally discharged; that while on his way for the doctor he went to his cabin, took the rifle and hid it where it was subsequently, and prior to his confession, found by an officer. The defendant offered himself as a witness at the trial, and in the course of his testimony said, "Of course, I could not tell whether I shot him or not."

The evidence is sufficient to warrant the jury in finding that the defendant killed the deceased. It does not, however, show that the killing was intentional, but it does sustain the view, which doubtless was adopted by the jury, that the homicide resulted from failure on his part to exercise due care and circumspection in discharging the fatal shot; that his conduct amounted to criminal negligence, rendering him guilty of manslaughter.

Section 192 of the Penal Code declares: "Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: . . . 2. Involuntary . . . in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

"An unintentional homicide committed through the negligent handling of a firearm in a way indicating a reckless disregard of life is manslaughter. It is negligence to point a firearm at another without examining to see whether or not it is loaded, or to handle or use it in a place where a discharge is likely to injure another, as in a highway." (1 Michie on Homicide, p. 253.)

So, where parties were playing or skylarking and defendant recklessly handled his gun. (*Murphy v. Commonwealth* (Ky.), 22 S. W. 649; *Henderson v. State*, 98 Ala. 35, [13 South. 146].) In the first-mentioned case the fact that the shot was caused by defendant's finger accidentally slipping on the trigger was held to be an insufficient excuse.

Equally without merit is the defendant's claim that the *corpus delicti* was not proven independently of the extra-judicial statements of the defendant. The deceased shortly after a shot was fired was found mortally wounded by a bullet under circumstances that exclude any inference that the wound was self-inflicted. We have therefore direct evi-

dence of death, and cogent and irresistible evidence of violence independent of the evidence of the defendant. Here, as in the case of *People v. Carlson*, 8 Cal. App. 730, 732, [97 Pac. 827], there was ample evidence tending to show that a crime had been committed by someone, and therefore the admissions and confessions of defendant made voluntarily were properly received in evidence. Every killing is unlawful unless expressly excused or justified by law. The homicide being shown to have been committed by defendant it is incumbent upon him to prove circumstances in mitigation, excuse, or justification unless they arise out of the evidence produced against him. The mere fact of the killing having been proved to have been done by the defendant, and nothing further, the presumption of law is that it was malicious and an act of murder. (*People v. Knapp*, 71 Cal. 1, [11 Pac. 793]; *People v. Bush*, 71 Cal. 602, [12 Pac. 781]; *People v. March*, 6 Cal. 543; *People v. Roberts*, 6 Cal. 214.)

Coming now finally to the point that it was prejudicial error to allow the jury, in the absence of the defendant, to view the scene of the alleged crime, we have no doubt that the defendant had a right to be present when the premises were being visited by the jury, but it is settled that he may waive this right (*People v. White*, 20 Cal. App. 156, [128 Pac. 417]), and in this case it was expressly stipulated by counsel that no one need accompany the jury except the sheriff.

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 10, 1917.

[Civ. No. 2065. First Appellate District.—March 15, 1917.]

DOMENICO ROLLERI, Respondent, v. ROSIE ROLLERI, Appellant.

DIVORCE—SETTLEMENT OF PROPERTY RIGHTS—SUPPORT OF MINOR CHILD.

Where pending a suit for divorce the parties entered into an agreement for settlement of their property rights, the property being the separate property of the husband, in which agreement the wife was to take the custody of the minor child and support him and receive in consideration thereof in full of all her claims to the property, a certain sum, the decree in her favor embodying an order in accordance with the agreement, there was no abuse of discretion in the court's denying a later application for an allowance from the husband for the support of the child, where it appeared that the wife still had on hand most of the money received in the settlement, which was in a form available for the support of the child, and it further appeared that the husband had fully performed the contract.

APPEALS from orders of the Superior Court of Santa Clara County denying motions for orders to pay for the support and education of a minor child. W. A. Beasley, Judge.

The facts are stated in the opinion of the court.

William R. Biaggi, for Appellant.

B. A. Herrington, and James L. Atteridge, for Respondent.

THE COURT.—The plaintiff sued the defendant for a divorce. Pending suit the parties came together and entered into an arrangement with reference to their property rights. The property, whatever there was, was the separate property of the husband. They entered into an agreement by which the wife—the defendant—was to take the custody of the minor child (whose interests are now sought to be advanced) and was to support him, and was to receive in consideration thereof, and in full of all her claims to the property of the plaintiff, the sum of two thousand dollars. The plaintiff recovered a judgment against his wife for divorce, and the court embodied in that judgment an order in accordance with the aforesaid agreement of the parties. Later on the defendant in the case moved the court for an allowance for the sup-

port of the child. Upon the hearing of that motion it appeared that she still had on hand something between one thousand five hundred and two thousand dollars of the sum of money which she had received in accordance with the agreement with her husband, and that that money was in a form to be available for the support of the child—whose support she had undertaken at the time she received it. It appeared on the other hand that the plaintiff on his part had fully performed all the conditions of that agreement. The court denied the motion, and the only question before us is as to whether it was an abuse of discretion for the court so to do. We are satisfied from the record that there was no such abuse of discretion. The orders appealed from are therefore affirmed.

[Civ. No. 2038. First Appellate District.—March 15, 1917.]

MYRTLE K. VAN TASSELL, Respondent, v. ELLA HEIDT, Defendant; LAURA HEIDT, Administratrix, etc., et al., Appellants.

ALIENATION OF AFFECTIONS—INSUFFICIENCY OF EVIDENCE.—In this action for damages for alienation of affections it is held that the evidence was insufficient to justify the findings and decision of the trial court.

APPEAL from a judgment of the Superior Court of Santa Cruz County. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Charles M. Cassin, and James L. Atteridge, for Appellants.

John H. Leonard, and W. P. Netherton, for Respondent.

THE COURT.—From the examination which the court has made of the entire record in this case, and dealing with the matter of the insufficiency of the evidence to justify the decision of the court, we are satisfied that the evidence is wholly insufficient to warrant the findings and decision of the trial court. This being an action against the parents of a young

woman, who alone have appealed, for having alienated from his wife the affections of a man who had illicitly sought the regard of said daughter, the evidence does not show that the defendants in the action were ever guilty of conduct tending to alienate the affections of the husband from his wife so as to subject them to an action for damages. In other words, there is no sufficient evidence to support the findings and judgment of the trial court in so far as the appellants, the father and mother, are concerned. That being so—and without reference to the question of the error which the court made in the admission of hearsay evidence, which seems to have been repeated, but which may not have been sufficiently objected to—we think that the judgment against the appellants ought to be reversed, and it is so ordered.

[Civ. No. 2018. First Appellate District.—March 15, 1917.]

**L. & E. EMANUEL, INC. (a Corporation), Respondent, v.
OBERLIN BROS. CO. (a Corporation), Appellant.**

**PLACE OF TRIAL—CONTRACT—REMOVAL TO CORPORATION'S PRINCIPAL
PLACE OF BUSINESS.**—A defendant corporation is entitled to have removed to the county of its principal place of business for trial, an action on a contract made in that county and to be performed there.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a motion for a change of place of trial. E. P. Mogan, Judge.

The facts are stated in the opinion of the court.

Everts & Ewing, and R. G. Retallick, for Appellant.

Milton L. Schmitt, for Respondent.

THE COURT.—This is an appeal by defendant from an order denying its motion for a change of the place of trial.

From the record it appears that the contract involved in the action, entered into by correspondence, was made in Fresno County, and was to be performed there. It also

appears that the defendant's principal place of business is in that county. Under familiar rules, therefore, the defendant was entitled to have the case tried in the county of Fresno. It is true that a small part of the work to be done by the plaintiff, under said contract, consisted in the alteration of some showcases, which when so altered were to be delivered for shipment to Fresno f. o. b. San Francisco; but these cases and other fixtures to be manufactured by plaintiff in San Francisco were to be installed by it in the defendant's store in Fresno, so that this part of the contract, like the remainder, must be regarded as performable in Fresno County.

The order is reversed, and the court is directed to grant defendant's demand that the place of trial of the action be changed from the city and county of San Francisco to the county of Fresno.

[Crim. No. 630. First Appellate District.—March 15, 1917.]

THE PEOPLE, Respondent, v. YIP SING, Appellant.

CRIMINAL LAW — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.—In a criminal prosecution where alleged newly discovered evidence would have done no more than contradict the statements of some of the witnesses who testified at the trial, the trial court committed no error in refusing to grant a new trial because of the discovery of such evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

B. V. Sargent, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

THE COURT.—The defendant in this case was convicted of the crime of assault with intent to commit murder. The appeal is from the judgment and an order denying the defendant a new trial.

The record before us does not support the contention that the trial judge was guilty of misconduct, prejudicial or otherwise, during the course of the trial.

The evidence adduced upon the whole case, which was conflicting, sufficiently supports the verdict and judgment.

The alleged newly discovered evidence would have done no more than contradict the statements of some of the witnesses who testified at the trial. This being so, the trial court committed no error in refusing to grant a new trial because of the discovery of such evidence.

The judgment and order appealed from are affirmed.

[Civ. No. 2026. First Appellate District.—March 15, 1917.]

ADA FARIAS, Respondent, v. WILLIAM FARIAS, Appellant.

DEFAULT JUDGMENT—RELIEF UNDER SECTION 473, CODE OF CIVIL PROCEDURE—REFUSAL TO VACATE—TARDY AND INSUFFICIENTLY SUPPORTED MOTION.—A motion made under section 473 of the Code of Civil Procedure to set aside a judgment by default in an action for divorce upon the ground of excusable neglect, is properly denied, where the application was not made until a few days prior to the expiration of the six-month period, and only supported by the affidavit of the defendant, reciting that the reason why no appearance had been filed prior to the default, was that the defendant's attorney was away at the time and neglected to enter an appearance or procure an extension of time to do so.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a motion to vacate a default judgment. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

George L. Keefer, and Ben W. Utter, for Appellant.

George Appell, for Respondent.

THE COURT.—This is an appeal from an order denying a motion to vacate a judgment by default in an action for divorce.

The action was commenced by the plaintiff and respondent against the defendant and appellant in the city and county of San Francisco on October 27, 1913. The defendant was served with summons in the county of Los Angeles on November 19, 1913. Within a few days thereafter he wrote to an attorney in San Francisco named Montagu, sending him \$15 to be applied on account of court costs and attorney's fees, and directing him to appear for defendant in the action. No appearance was filed, and no application for an extension of time within which to appear was made to either the court or counsel for plaintiff, and the time for making such appearance expired on December 19, 1913. The default of defendant was entered on the 17th of January, 1914, and an interlocutory judgment entered shortly thereafter. The appellant made no move to set aside said default nor for relief from said judgment until July 3, 1914, when he appeared and made a motion to set aside said default under section 473 of the Code of Civil Procedure, which said motion was predicated upon the affidavit of said defendant to the effect that the reason why no appearance was filed by said defendant prior to the entry of said default was that "said Montagu had occasion to go out of the city and county of San Francisco for a few days, and the said Montagu went out of said city and was absent about the time it was necessary to file a demurrer in said action to prevent a default being entered against defendant; that when said Montagu was out of the city of San Francisco attending to other business he inadvertently overlooked the said case of defendant, and failed to file a demurrer or answer, and failed to get an extension of time within which to appear in said action. . . . Said attorney was so engrossed with other business out of the city of San Francisco that he overlooked the case and failed to appear." No affidavit is presented from Montagu in support of defendant's said motion; and it is very evident from the foregoing quotations from his affidavit that the matters which are therein stated are purely hearsay, and therefore of little if any value as evidence, and are entirely insufficient to make out a case of excusable neglect under section 473 of the Code of Civil Procedure.

In addition to this there was evidence before the trial court in the form of a letter which was written by Montagu to the defendant prior to the time when his default for non-

appearance in the case could be entered, indicating that whatever steps were to be taken in the action were to be merely for delay, or in the language of said attorney, "to bother and stall her if emergency requires it."

With the foregoing facts before it it is clear that the trial court committed no abuse of discretion in refusing to set aside the judgment upon the defendant's tardy and insufficiently supported motion for such an order. We find, therefore, no merit in this appeal.

Order affirmed.

[Civ. No. 2220. Second Appellate District.—March 15, 1917.]

SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation), Respondent, v. H. W. BLAISDELL et al., Appellants.

DEED—CONTRACT OF SALE RESTRICTING SALE OF INTOXICATING LIQUORS—RIGHT TO ENFORCE FORFEITURE—RETURN OF PURCHASE MONEY—INSUFFICIENT REPUDIATION BY VENDOR.—Where a contract of sale of real property contained a provision that when the deed was made it should include a condition that the premises should never be used as a place of business for the sale of intoxicating liquors, and that the title conveyed should revert to the vendor upon breach of that condition, the vendor, upon a threatened breach of such condition, is not deprived of his rights to enforce a forfeiture of the vendee's rights under the contract, by the return to the vendee of the balance of the purchase price, which had been paid before due, as the vendor was not obliged to receive payment, and was justified in declining to proceed until it could be assured that the purchaser would not carry into effect his threatened violation of his covenants.

ID.—INJUNCTION—FURTHER BREACH—LACK OF PREJUDICE.—Where the rights of the vendee under such a contract are forfeited, an injunction restraining a further breach is not prejudicial to the vendee, as he has no further right to occupy the premises.

ID.—BREACH OF CONDITION—RIGHT OF VENDOR.—Upon such a breach, the vendor may refuse to execute the deed and may quiet his title against the purchaser's claims under the contract.

ID.—INSUFFICIENT SHOWING OF MONOPOLY.—The rule that where the owner of the land designed as a site for a town inserts in all deeds made by him a condition against the sale of intoxicating liquors on the land conveyed, solely for the purpose of reserving to himself a

monopoly of such business, the condition is void as against public policy and its breach will not work a forfeiture to the estate granted, has no application to such case, where the evidence did not show that there was a design to create a monopoly.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Rowen Irwin, for Appellants.

Frank McGowan, Frank Thunen, and Wm. M. Singer, for Respondent.

CONREY, P. J.—Under date of January 28, 1910, a contract was entered into between the plaintiff as vendor and the defendant H. W. Blaisdell as vendee, whereby the plaintiff sold to Blaisdell lots 15 and 16 of block 2 of the town of Moron in Kern County, which town afterward was incorporated as the city of Taft. It was agreed that the conveyance when made should include a condition that the premises should never be used as a place of business for the sale of intoxicating liquors, and that the title conveyed should revert to the vendor upon breach of that condition. The complaint asked for an injunction restraining the defendants from selling or keeping for sale intoxicating liquors upon the said lots, sought to quiet title to the same premises, and that plaintiff recover possession thereof. The appeal is from that portion of the judgment which granted the desired relief. No recovery was had as to lot 15.

One-third of the contract price was paid at the execution of the agreement. The second payment was to become due January 28, 1911, and the final payment on January 28, 1912. The purchaser was permitted to take possession when the contract was made. On January 16, 1911, Blaisdell entered into a contract of lease with defendants Dover and Wilson for five years. The lease did not state the purpose for which the lessees were to use the premises. On the same day the same parties entered into a collateral contract that Dover and Wilson would discontinue the sale of intoxicating liquor on those premises within five days after demand made upon them in writing so to do. By that agreement Blaisdell stip-

ulated that he would not molest or cause any trouble to Dover and Wilson with reference to the sales of liquors on said property, "unless compelled by the Southern Pacific Railroad Company under penalty of forfeiture," etc. The lessees proceeded to furnish the room located on lot 16 as a saloon, stocked it with intoxicating liquors, and commenced to do business there on the thirteenth day of March, 1911. On or about January 18, 1911, defendant Blaisdell paid to the agent in charge of the sale of plaintiff's land at Taft the full balance due upon the purchase price of said lots, and a few days later this money was returned to him. It does not appear that Blaisdell declined to receive this money, or that he ever made any demand for a deed. As soon as the actual business of the saloon was commenced, notices declaring forfeiture of the contract were served by the plaintiff. Service was made on Dover and Wilson on the thirteenth day of March, 1911, and on Blaisdell on March 16, 1911, and on the other defendants within a few days thereafter.

Defendants claim that the plaintiff repudiated its contract before any violation of the condition had occurred, and that the plaintiff having thus failed to fulfill all conditions precedent thereto imposed upon itself, it is not entitled to enforce a forfeiture of Blaisdell's rights under the contract. This contention should not be sustained. First, it may be noted that on January 18, 1911, no money was due and the plaintiff was not obliged to receive payment. And if it be admitted that the money was returned because plaintiff had learned of the preparations which were being made to violate the conditions of the contract which provided against the sale of intoxicating liquors on the premises, then the vendor was justified in declining to proceed further with the contract until it could be assured that the purchaser would not carry into effect this threatened violation of his covenants.

Appellants next urge that the plaintiff is not entitled to the permanent injunction which it seeks. Under this head they say that the plaintiff has a plain, speedy, and adequate remedy at law; that plaintiff will not be irreparably damaged by failure to issue an injunction; and that equity will not lend its aid to bring about or enforce a penalty or a forfeiture. It seems unnecessary to go into this question. If the contract has been forfeited, and if the plaintiff is entitled to a decree quieting its title as against the contract equities

of the purchaser, it would seem that the defendants cannot suffer any recognizable or legal prejudice by the injunction, since they have no further right to occupy the lot on which the saloon business was conducted.

We do not observe that appellants contend against the proposition that conditions designed to prevent the use of sold or conveyed premises as a place of business for the sale of intoxicating liquors, are enforceable. "Where a grant is made upon condition subsequent, and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant, duly acknowledged for record." (Civ. Code, sec. 1109; *Firth v. Marovich*, 160 Cal. 257, [Ann. Cas. 1912D, 1190, 116 Pac. 729]; *Quatman v. McCray*, 128 Cal. 285, [60 Pac. 855].) And since a reconveyance may be compelled where the grant has been made and the condition subsequent has been broken, it follows of course that upon like breach of conditions subsequent as provided for in a contract to convey, the vendor may refuse to make the deed and may quiet his title against the purchaser's claims under the contract.

Counsel for appellants insists that it was incumbent upon the plaintiff to establish that the restrictive clause was applied impartially to all lots sold by it in the town of Moron, and that no forfeiture can be granted without proof of this fact. They rely upon *Burdell v. Grandi*, 152 Cal. 376, [125 Am. St. Rep. 61, 14 L. R. A. (N. S.) 909, 92 Pac. 1022]. That was an action to recover possession of a lot for an alleged violation of a condition subsequent. The decision states that a condition of that character providing for a forfeiture in case of breach is valid; and holds that where the owner of land designed as the site for a town inserts in all deeds made by him a condition against the sale of intoxicating liquors on the land conveyed, solely for the purpose of reserving to himself a monopoly of such business, the condition is void as against public policy, and its breach will not work a forfeiture of the estate granted. In that case the court had found, presumably upon sufficient evidence, that the purpose of the vendor in imposing the condition was to reserve in himself such monopoly. In the present case the evidence shows that a great many sales by contract were made by the plaintiff, and that like conditions were incorporated in every contract.

and deed covering lots in the town, that have been issued by the company. While the evidence thus shows that the plaintiff was making these conditions in all sales, such evidence is not inconsistent with the claim that the plaintiff may have intended to reserve a lot or lots for itself on which it alone might conduct the inhibited business. It would seem, however, that the defense that plaintiff was contemplating such monopoly cannot be implied from the facts proved herein; nor was any evidence introduced by the defendants tending to show such design to create a monopoly.

The judgment is affirmed.

James, J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 10, 1917.

[Civ. No. 2221. Second Appellate District.—March 15, 1917.]

SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation), Respondent, v. H. W. BLAISDELL et al., Appellants.

VENDOR AND PURCHASER—CONTRACT OF SALE—RESTRICTION AGAINST SALE OF INTOXICANTS—FORFEITURE FOR BREACH.—A vendor under a contract for the sale of real property is not estopped from enforcing forfeiture of the interest acquired by the vendees under the contract for breach of a condition providing against the sale of intoxicating liquors on the premises, because it accepted payment of money on account of the contract price after breach, where it at the time of such acceptance had no knowledge of the breach.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Rowen Irwin, for Appellants.

Frank McGowan, Frank Thunen, and Wm. M. Singer, for Respondent.

CONREY, P. J.—This action in substance is one to enforce forfeiture of the interest acquired by the defendants or some of them under a contract of sale of real property; the cause of action being based upon defendants' breach of a condition providing against the sale of intoxicating liquors upon the sold premises. The contract is in like form and the complaint is in substance the same as in *Southern Pacific R. R. Co. v. Blaisdell*, *ante*, p. 239, [164 Pac. 804], wherein judgment in favor of the plaintiff has been this day affirmed.

The contract in this case provided for the sale and conveyance to H. W. Blaisdell of lots 26 to 30 in block 2 in the town of Moron in Kern County. It was dated January 28, 1910, at which time one-third of the purchase price was paid, and the second and third payments were to be made on January 28, 1911, and January 28, 1912, respectively. We will confine our discussion to the one proposition urged as a ground for reversal herein, not included in the other case.

The judgment quiets the plaintiff's title to lot 29 only, and enjoins the defendants from selling intoxicating liquors upon that lot. The appeal is from that judgment.

Appellants claim that the plaintiff is estopped to enforce a forfeiture because it received from Blaisdell money on account of the contract price after a saloon had been opened in which the business of selling intoxicating liquors was conducted. There is evidence tending to show that on January 13, 1911, a saloon was opened on lot 29 under a lease from Blaisdell. Final payment on the contract was made by Blaisdell at about that time. The receipt given by plaintiff company for that money bears date January 24th. The witness McAllaster, who was in charge of the land business of the plaintiff in its office at San Francisco, testified that the money came to that office three or four days before the date of the receipt; that "the money was credited on the contract covering lots 26 to 30 because we did not know of any violation. Subsequently we learned of the violation, and learned of it before the deed was finally executed, and did not deliver the deed."

The answer of the defendants did not attempt to state a defense upon the ground that plaintiff had commenced and prosecuted its action without offering to return to Blaisdell the money paid by him. The defense most nearly touching this matter is found in the allegation that on or about Novem-

ber 25, 1910, plaintiff consented that a saloon for the purpose of selling alcoholic and other liquors might be conducted upon the sold premises; that upon the faith of that consent the defendant Woods had expended a large sum of money; and that therefore the plaintiff should be estopped from enforcing the anti-saloon condition of the contract. There was a total failure to prove consent so alleged to have been given by the plaintiff, and there is no evidence that the defendant Blaisdell, or any one claiming under him, has ever demanded or offered to receive from the plaintiff any money on account of this contract.

If the deed had been executed, and then the grantor had sought to obtain a reconveyance because of a subsequently discovered breach of the condition stated in the deed, such action could have been maintained without returning to grantee the consideration paid for the property. We perceive no reason why the purchaser has any better right to claim return of money which he has paid on his contract, where no deed has been made, and where he is guilty of breach of a like condition and is made defendant in an action to have it declared that, by reason of such breach, his rights under the contract are at an end.

The judgment is affirmed.

James, J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 10, 1917.

[Civ. No. 2208. Second Appellate District.—March 17, 1917.]

CAROL CROUSE-PROUTY, Respondent, v. JULIA A. N. ROGERS et al., Appellants.

QUIETING TITLE—PURCHASE OF PROPERTY—NOTICE OF TRUST—TITLE ACQUIRED.—Where in an action to quiet title it is shown that the defendant when she received her deed to the property had notice that her grantor, if he had any title whatever to the property, had nothing more than the bare legal title, which was necessarily a title held in trust for plaintiff, who then owned the entire beneficial interest, the defendant, if the title vested in her at all, received it upon the same trust and subject to the same unconditional obligation to convey to the plaintiff.

ID.—DECREE QUIETING TITLE—ORDERING OF CONVEYANCE.—Where in such an action it is determined that the legal title to the property is vested in the defendant subject to an unconditional obligation to convey to the plaintiff, it is not prejudicial error to decree a quieting of the plaintiff's title without ordering the execution of a conveyance.

ID.—PURCHASE OF LOT FROM CORPORATION—REPRESENTATIONS OF OFFICER AS TO TITLE—ESTOPPEL.—Where a lot was purchased from a corporation, and its president and secretary represented to the purchaser that the deed to be delivered to her by the corporation would convey to her a good and perfect title to the lot, and she believed those representations and relied upon them without making inquiry, making payments partly in cash and partly by note secured by mortgage on the lot, the corporation is estopped from denying her ownership, notwithstanding such officer acted in good faith, and made no misrepresentations as to the title, and the purchaser had constructive notice of the condition thereof.

ID.—STATUTE OF LIMITATIONS.—An action to quiet title is not barred by the provisions of section 318 of the Code of Civil Procedure, which provides a five-year limitation for the recovery of real property, where the plaintiff was seized of the property at all times down to the time when the action was begun and defendant held the legal title in trust for plaintiff, and there had not been any repudiation of the trust.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Lewis R. Works, Judge.

The facts are stated in the opinion of the court.

Haas & Dunnigan, for Appellants.

Carter, Kirby & Henderson, and Schweitzer & Hutton, for Respondent.

CONREY, P. J.—This is an appeal by the defendants from a judgment quieting plaintiff's title to the lot described in the complaint, and from an order denying the motion of defendants for a new trial. There was a former trial of the action and a decision by this court affirming an order granting a new trial. In that decision there is a statement of facts, and we will repeat here that portion thereof which is identical with the facts proved at the second trial (13 Cal. App. 561, [110 Pac. 142]):

"On December 26, 1885, Andrew Glassell, who was the common source of title, entered into a contract with Ralph and W. E. Rogers, whereby he agreed to sell and convey to them a large tract of land, which included the lot in controversy. On March 24, 1886, Ralph and W. E. Rogers transferred this agreement for purchase to a corporation known as the Garvanza Land Company, which, under the terms of the agreement, caused a portion of the land to be subdivided into lots and blocks and designated it as 'Garvanza Addition No. 1,' map of which was duly recorded. On June 19, 1886, the corporation, for a valuable consideration, executed a deed, which was duly recorded, to plaintiff Carol Crouse-Prouty, whereby it conveyed to her the lot in question. After the execution of this deed by the corporation, and on December 15, 1886, the corporation transferred the Glassell contract to W. F. McClure, who, on the day following, assigned it to Ralph Rogers. On July 12, 1888, Glassell executed a grant deed to Ralph Rogers of the lands described in the said contract, excepting therefrom certain tracts, which excepted lands did not, however, include the lot involved in this action. W. E. Rogers joined Glassell in the execution of this conveyance. This deed recited payment of the consideration mentioned in the contract, and that 'this deed is delivered and accepted in satisfaction of the existing obligations of the party of the first part (Glassell), by reason of said contract of December 26, 1885.' On January 2, 1892, Ralph Rogers conveyed the lot in question, together with other lands, to one Conway, from whom, by mesne conveyance, defendants acquired what-

ever title they have to the lot. It thus appears that plaintiff's claim of title to the lot is by virtue of the deed from the Garvanza Land Company, whose only interest in the lot was by virtue of the Glassell contract, while defendants claim under a subsequent deed made by Ralph Rogers after he had acquired title to the property by a deed executed pursuant to the Glassell contract. The record contains evidence which tends to prove . . . that Julia Nolan Rogers at the time she claims to have acquired the lot by purchase for a valuable consideration had actual notice of the conveyance of the lot to plaintiff Carol Crouse-Prouty, and of the fact that she claimed ownership under the deed from the corporation. Moreover, under the facts presented, the court might be justified in holding the record of plaintiff's deed sufficient to impart constructive notice. (*Rogers v. McCartney*, 3 Cal. App. 34, [84 Pac. 215].)"

It will be noted that in its former decision this court assumed that the deed of Garvanza Land Company to the plaintiff contained a sufficient description to identify the land described in the complaint, and that the record thereof was sufficient to impart constructive notice. Nevertheless, the defendants continue to insist that the description in that deed was not sufficient for the purpose of passing title. That description, so far as the name of the tract was concerned, did not name the tract as "Garvanza Addition No. 1," but located the tract "at Garvanza." Also the deed referred to a map made by W. F. McClure in April and May, 1886, as a map recorded in Miscellaneous Records, book 9, at pages 85, 86, and 87. There was no such map recorded at those pages. The evidence shows that there was a map of "Garvanza Addition No. 1" recorded in said book 9, at pages 45 and 46. The evidence shows that the map recorded at pages 45 and 46 is the only map of record in Los Angeles County of the property situated in the territory or district known as Garvanza, on which there is shown a block "P," or which bears the inscription or indorsement, "Survey, April and May, 1886, W. F. McClure, C. E.;" that there is only one lot 6 in said block "P," and there is no other lot 6 in block "P" in said territory commonly known as Garvanza; also, that Garvanza Land Company never sold or subdivided any lots in any block "P," except block "P" of Garvanza Addition No. 1; that there was not at the time of the sale and conveyance of lots

6 and 7 to the plaintiff, or since that time, any tract or subdivision at or in Garvanza, or in the vicinity thereof, that contained a block "P," except Garvanza Addition No. 1. On these facts we hold that the description in the deed was sufficient. See, also, *Leonard v. Osburn*, 169 Cal. 157, [146 Pac. 530], which approves the decision in *Rogers v. McCartney*, 3 Cal. App. 34, [84 Pac. 215].

Plaintiff's deed when recorded gave constructive notice that Garvanza Land Company had granted the lot in question to her, and there was then on record a contract which gave notice that Garvanza Land Company had acquired the right to obtain the legal title upon payment of the consideration agreed to be paid to Glassell. The deed from Glassell to Ralph Rogers, which also was of record prior to any conveyance of lot 6 by Ralph Rogers, showed that the consideration for all of the described lands, including the lot in question, had been paid to Glassell. Defendant Rogers before receiving her deed, also had actual notice that the plaintiff claimed ownership under her deed from Garvanza Land Company. Defendant Rogers therefore had notice that her grantor, successor by mesne conveyance from Ralph Rogers, if he had any title whatever to this lot, had nothing more than the bare legal title, which necessarily would be a title held in trust for the plaintiff who then owned the entire beneficial interest. Therefore, the defendant Rogers, if the title vested in her at all, received it upon the same trust and subject to the same unconditional obligation to convey to the plaintiff. This conclusion is strengthened, if it needs any further support, by the fact, which the court found upon sufficient evidence, that the grantee to whom Ralph Rogers conveyed this lot, and the succeeding grantees to and including Julia N. Rogers, paid no consideration whatever for their said conveyances.

If under the facts above stated it should be determined that the legal title to the lot is now vested in the defendant, subject to an unconditional obligation to convey to the plaintiff, there would be no prejudicial error in the court's decree which quieted title in the plaintiff as owner of the lot and did not order the execution of any deed of conveyance. In any event, the result of the decree would be to establish ownership in the plaintiff and put an end to the claims of the defendant. (*Jones v. Jones*, 140 Cal. 587, [74 Pac. 143].)

But the plaintiff further claims title by estoppel. During the transactions whereby the plaintiff purchased the lot from Garvanza Land Company and paid for the same and received her deed, it was represented to her by Ralph Rogers, the president of the company, and by its secretary, that the deed to be delivered to her by Garvanza Land Company would convey to her a good and perfect title to the lot. She believed those representations and relied upon them in all of those transactions, without making any other investigations or inquiry as to the title. At the time of receiving her deed, plaintiff paid the consideration partly in cash, and gave to the corporation her note for the remainder, secured by mortgage on the two lots conveyed. On June 8, 1887, she paid this note, and the mortgage was satisfied on the record by the company by Ralph Rogers, as president. Upon those facts Garvanza Land Company would have been estopped to deny plaintiff's ownership of the lot. And as Ralph Rogers received an assignment of the company's contract, and thereafter from Glassell a conveyance of the land covered by the contract, he was charged with full notice of all of the facts upon which the plaintiff relied as against that company, and the same estoppel was binding upon him. Upon the facts, which we have stated, it seems clear that the plaintiff's rights are unaffected by the subsequent conveyances of the series which ended with the deed to defendant Rogers. Appellants claim that the doctrine of estoppel cannot be applied to the case, because it appears that Ralph Rogers and Garvanza Land Company, in their transactions with the plaintiff, acted in entire good faith and made no misrepresentations as to the title to the property conveyed to the plaintiff; that when the deed was made to plaintiff she had constructive record notice of the condition of the Garvanza Land Company's title; and that she had the same means of investigating the title that was possessed by her grantor and by Ralph Rogers. This contention should not be sustained. (*Karns v. Olney*, 80 Cal. 90, [13 Am. St. Rep. 101, 22 Pac. 57]; *Reis v. Lawrence*, 63 Cal. 129, [49 Am. Rep. 83]; *Ions v. Harbison*, 112 Cal. 260, [44 Pac. 572].)

Defendants pleaded that the action is barred by the provisions of section 318 of the Code of Civil Procedure and by subdivision 2 and by subdivision 4 of section 338 and by section 343 of that code. The two latter sections are contained in the chapter concerning the time of commencing actions

other than for the recovery of real property, and do not apply to this case. In *Murphy v. Crowley*, 140 Cal. 141, 146, [73 Pac. 820], the earlier decisions were reviewed, and the court said: "It seems to be established, therefore, by these cases that, although the main ground of the action is fraud or mistake, whereby the defendant has obtained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet, if the plaintiff alleges facts which show, as matter of law, that he is entitled to possession of the property, and a part of the relief asked is, that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the five-year limitation contained in section 318." Here the plaintiff by her complaint alleged ownership of the lot and seeks to quiet her title, and for all appropriate relief in equity. The controversy exists by reason of the adverse claim of the defendants based upon a chain of title which begins with a mistake made by Ralph Rogers in executing a deed purporting to convey land which he did not have a right to convey to any one other than the plaintiff. Section 318 is the only one of the code sections constituting the statute of limitations, which can be applied to a case of this kind. That section reads as follows: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action." If by reason of defendants' estoppel to set up the claim which they assert in this action, title vested in the plaintiff (as we hold that it did), then the plaintiff was seised of the property within the meaning of section 318, at all times down to the time when this action was begun, and if the defendant Rogers is to be treated as holding the title in trust for the plaintiff, the rights of the plaintiff are not barred by any statute of limitations. There had not been, prior to the beginning of the prescribed period, or at all, any repudiation of the trust sufficient to set the statute in motion. Actual possession of the lot had not been taken by the defendants, nor by any person under whom they claim, and the plaintiff had not been notified of any adverse claim against her. (*Luco v. De Toro*, 91 Cal. 405, [18 Pac. 866, 27 Pac. 1082].)

Finally, it should be noted that the transcript begins with an amended complaint filed October 21, 1912, and the record before us does not show when the action was commenced.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 2277. Second Appellate District.—March 17, 1917.]

C. F. VAN DE WATER, Petitioner, v. R. W. PRIDHAM et al., as Constituting the Board of Supervisors of Los Angeles County, Respondents.

DRainage ACT—DISPOSITION OF BONDS—CONSTRUCTION OF ACT—REPUGNANCY OF PROVISIONS.—The act of the legislature entitled "An act to promote the drainage of wet, swamp, and overflowed lands, and to promote the public health in the communities in which they lie," approved March 21, 1903 (Stats. 1903, p. 354), as amended in 1915 (Stats. 1915, p. 359), is not invalid because of the repugnancy existing between sections 8d and 8e, as to the disposition to be made of the bonds to be issued by the county to represent the cost of the work, when the language of the whole act is considered, as upon such a consideration it is apparent that it was the intent of the legislature that payment for the work should be in bonds equal to the amount of the contractor's bid, plus such sum as he, under all the requirements of the act, should advance in payment of all incidental expenses connected with the work, delivered by the treasurer to the contractor or his assignees as provided by section 8d, and not that they should be sold by the board of supervisors as provided by section 8e.

Id.—CONSTRUCTION OF DRAINAGE CANAL THROUGH STREETS OF MUNICIPALITY—CONSENT OF CORPORATION—VALIDITY OF ORDINANCE.—A municipal corporation operating under a freeholders' charter, which vests in the city plenary control of all uses of its streets, has the power to enact an ordinance giving the board of supervisors of a drainage district permission to construct a drainage canal through certain specified streets; and without regard to the character of the charter, the consent of the legislative body of the city is a prerequisite condition to extending the drainage canal through the streets of the municipality.

Id.—CONSTRUCTION OF DITCH THROUGH CITY STREETS—CONSENT UPON TERMS—VALID ORDINANCE.—An ordinance granting consent of a

municipal corporation to the construction of a drainage ditch through its streets is not rendered a nullity by reason of the fact that such consent was upon certain terms named in the ordinance, which were protective of public interest, germane to the subject, and violative of no provision of the Drainage District Act.

ID.—DOING OF WORK—PUBLIC BENEFIT—SILENCE OF STATUTE—VALIDITY NOT AFFECTED BY.—The Drainage Act of 1903 is not void by reason of its failure to provide in direct terms that the doing of the work shall depend upon its being a public benefit, in view of section 4 of the act which makes the determination of the board to proceed with the hearing therein referred to presumptive evidence of the existence of all facts upon which the power of the board to proceed depends.

ID.—LOS ANGELES COUNTY FLOOD CONTROL ACT—DRAINAGE ACT NOT SUPERSEDED BY.—The Drainage Act of 1903 has not been superseded in Los Angeles County by the act of 1915 entitled "An act to create a flood control district, to be called 'Los Angeles county flood control district,'" (Stats. 1915, p. 1502), as the purpose of the Drainage Act is to dispose of the water and get rid of it as an injurious element, while the purpose of the County Flood Control Act is to conserve the water as a beneficial agent.

APPLICATION for a Writ of Review originally made to the District Court of Appeal for the Second Appellate District to review proceedings creating and establishing a drainage district.

The facts are stated in the opinion of the court.

A. J. Sherer, and Robert Young, for Petitioner.

A. J. Hill, County Counsel, and Charles E. Haas, Deputy County Counsel, for Respondents.

Ostrander, Clark & Carey, and John Outcalt, *Amici Curiae.*

SHAW, J.—Certiorari. The board of supervisors of Los Angeles County, claiming authority so to do under and by virtue of the provisions of a certain act of the legislature entitled, "An act to promote the drainage of wet, swamp and overflowed lands, and to promote the public health in the communities in which they lie," approved March 21, 1903 (Stats. 1903, p. 354), the title to which and the act were amended in 1915 (Stats. 1915, p. 359), in a proceeding instituted therefor

by petition, created and established a drainage district designated as "Los Angeles County Drainage District No. 1," the boundaries of which embrace certain territory in the city of Long Beach. When the proceedings had progressed to a point where the contract for constructing the drainage improvement had been awarded for the doing of the work and contract therefor executed, petitioner, as an owner of land in the district, brought this proceeding attacking the proceedings as in excess of the jurisdiction of the board. Petitioner asserts that the law under which the board of supervisors assumed to act is invalid, and hence the proceedings so had and thereunder taken by the board of supervisors for the formation of the district, award of contract for the doing of the work therein, and providing for the payment of the cost thereof by bonds issued for and on behalf of the district to the contractor for the cost of the work, were had and taken without authority of law.

This contention is based upon the following grounds: First. That there is an irreconcilable contradiction between the different sections of the Drainage Act relative to the disposition to be made of the bonds to be issued by the county to represent the cost of the proposed work. Second. That the inclusion of part of the city of Long Beach within the proposed drainage district, is unauthorized by law. Third. That the Drainage Act under which the proceedings were taken is wanting in any provision which restricts the power of the board acting thereunder to cases where the improvement would constitute a public benefit. Fourth. That the act has been superseded in Los Angeles County by a subsequent act adopted by the legislature, known as the "Los Angeles County Flood Control Act." We will discuss the points made by petitioner in the order in which they are presented in his brief.

1. To meet the cost of the formation of the district and the proposed improvement therein, the act provides for the issuance of bonds in form as prescribed. Section 8c of the act provides that if, upon a hearing had in accordance with section 8b, the board is of the opinion that the work contracted for has been completed, it shall by a resolution so declare and accept the work, and state therein "the aggregate amount for which bonds shall be issued, and . . . the amount of the incidental costs and expenses of the work and the proceeding which are charged against and to be paid by the contractor."

as provided in section 8g. Section 8d requires the clerk to transmit a copy of the order so made by the board of supervisors to the county treasurer, upon receipt of which such officer is required to issue bonds in the amount fixed by said board in said order; which bonds are to be signed by the presiding officer of the board and the county treasurer, and when so signed, "*said bonds shall be delivered by said treasurer to said contractor or to his order, assignee or lawful representative.*" Section 8e provides for the raising of a fund by special tax for the discharge and payment of the bonds and the interest thereon as the same become due, and to maintain and keep the works in repair, followed by the provision: "*And the board of supervisors is hereby vested with the power and it is the duty of said board to advertise said bonds for the sale by at least one insertion of a notice of sale in a newspaper of general circulation within the county and to sell said bonds to the highest responsible bidder, and to do all and singular the things necessary for the purpose of selling said bonds and which in this section aforesaid it is declared shall be done.*" It thus appears that the act contains two provisions touching the disposition of the bonds, which are wholly repugnant. It is impossible to give effect to both, for it is apparent that if the treasurer be required by the provision contained in section 8d to deliver them to the *contractor or to his order, assignee or lawful representative*, as payment for doing the work, it must necessarily render the provision for the sale thereof, contained in section 8e, wholly inoperative. Throughout the proceeding the board of supervisors acted upon the theory that the cost of the work and expenses incidental thereto should be paid for, not from the proceeds of the sale of bonds to be issued for and on behalf of the district, but in bonds issued and delivered directly to the contractor, who was required to advance all sums necessary to cover surveys, inspection, and incidental expenses. The contention of petitioner is that, since the conflict between the two provisions is so complete as to leave no possible room for giving effect to both, the one last in numerical order must prevail (*Turner v. Wilson*, 171 Cal. 600, [154 Pac. 2]), and this, indeed, is the provision of section 4484 of the Political Code, to which, however, must be added the qualification therein provided, "*unless such construction is inconsistent with the meaning of such chapter or article*"; in which case the rule of interpretation is that the

court should look to the language of the whole act and if it finds in any particular clause an expression not consistent in its import with those used in other parts of the same statute and not in harmony with its plan, purpose, and scope, and if by taking a view of the whole act it can collect from such larger and more extensive expressions the real intention of the legislature, it is its duty to give effect to that intention. (*State v. Jennings*, 27 Ark. 419; *Torrance v. McDougald*, 12 Ga. 526; *Mason v. Finch*, 2 Scam. (Ill.) 223; *In re Vanderberg*, 28 Kan. 173; *Pond v. Maddox*, 38 Cal. 572.) Applying this rule, we have no difficulty in reaching the conclusion that it was the intent of the legislature that payment for the work should be in bonds in a sum equal to the amount of the contractor's bid, plus such sum as he, under the requirements of the act, should advance in payment of all incidental expenses connected with the work, delivered by the treasurer to the contractor or his assignees. So construed the act provides a complete scheme for the financial administration of the undertaking, while the provision for sale as a means for such administration is incomplete and uncertain as to acts necessary to accomplish the purpose of the law. Among other provisions contained in the act which support the interpretation given, are those found in section 8g, which provides that "All the costs and expenses of the proceeding, inclusive especially of the compensation of the person appointed to furnish the specifications, of the superintendent of work, of the engineer of work, of the cost of all publications under this act required to be made, shall be chargeable to and paid by the contractor, and they shall have been paid before delivery of the bonds shall be made by the county treasurer; *provided, however*, that the county treasurer may make delivery of such bonds, if there be deposited with him, subject to the order of the board of supervisors, money to the amount of the costs and expenses chargeable to the contractor as the same is stated in the attested order of the board of supervisors, provided for in section 8d of this act. The contractor and all persons claiming under him any interest in said bonds, whether of ownership, lien or otherwise, shall be deemed to have notice of the contents of this section." The provisions of this section, later in numerical order than 8e, could have no reference to the sale of the bonds provided for in said last-mentioned section, but unquestionably refer to the conditions under which the

treasurer shall deliver the bonds to the contractor or upon his order or to his assignees, in which case the latter shall take notice of the provisions of the section as to the payments so required to be made by the contractor as a condition of having the bonds *claimed by him*, which shall represent the *total cost of the work* (sec. 8b), delivered to him by the treasurer (sec. 8d), for the *cost of the work*.

2. Section 1½ of the act provides: "Whenever a portion of any ditch or drain or system of ditches or drains for the drainage of any such body of wet, swamp, or overflowed lands passes through or forms the boundary line of any municipal corporation, or where adjacent territory within such municipality is found by said board of supervisors to be benefited by such work or improvement, such adjacent territory may be included within the boundaries of such drainage district in proceedings instituted for the creation of said drainage district; *provided*, said petitioners first obtain the consent of the governing body of such municipality, expressed by ordinance, to the construction of such ditch or drain or ditches or drains within the limits of such municipality, and thereupon all such territory shall be subject to the provisions of this act, and any work of any improvement herein contemplated to be done may be done either within or without the boundaries of the district organized therefor as may be necessary to properly drain by a ditch or drain or a system of ditches or drains any body of wet, swamp or overflowed lands within said district." Incorporated within the boundaries of the proposed district were certain lands located within the city of Long Beach through which the proposed drainage canal was to extend. Under the authority of said section 1½ of the act, the board of supervisors sought and obtained from the legislative body of the municipality its consent and permission, expressed by ordinance, to the construction of the drainage canal through certain specified streets of said city. Notwithstanding this ordinance, which contained conditions upon which the consent was made, petitioner insists, first, that the legislative body of said city of Long Beach, operating under a freeholders' charter, was without power to make the grant of such use; and, second, that the attaching of conditions to such consent rendered it null and of no effect. The want of power to consent to the construction of the works through the streets of the city to an outfall emptying into the ocean, is

based upon the contention that such use thereof confers upon the district control of the streets, which is violative of the provisions of the charter vesting in the city "plenary control of all uses of its streets," together with all matters of internal sanitation; that hence the work proposed to be done by the district is a municipal affair as to which the freeholders' charter under which the city is operating is the controlling law. (Const., art. XI, sec. 6; *Fritz v. San Francisco*, 132 Cal. 373, [64 Pac. 566]; *Barber Asphalt Pav. Co. v. Costa*, 171 Cal. 138, [152 Pac. 298].) In our opinion, the control of its streets, which under its freeholders' charter the city of Long Beach exercises over its streets, does not differ from that exercised by cities of the state operating under the general law. The act recognizes the right of such control in all municipalities, whether created under general law or operating under charter adopted pursuant to the constitution. Without regard to the character of the charter, the consent of the legislative body of the city is a prerequisite condition to extending the drainage canal through the streets of the municipality. It has been repeatedly held that the legislature may provide for the creation of districts such as that here involved and for the financial administration of their affairs, which include lands in municipalities. (*Board of Directors of Modesto Irr. Dist. v. Tregea*, 88 Cal. 334, [26 Pac. 237]; *La Mesa Homes Co. v. La Mesa etc. Irr. Dist.*, 173 Cal. 121, [159 Pac. 593]; *In re Madera Irr. Dist.*, 92 Cal. 297, [27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675].) In the case last cited the question involved was that of including a part of a municipality in an irrigation district, and it was there said: "Neither is it in violation of the constitution to incorporate into such district a town or city that has been incorporated for other municipal purposes. A system of irrigation contemplated by the act in question cannot be considered as a municipal purpose within the scope of the organization of a city or town, and there can be no conflict between a corporation organized under the act to produce a system of irrigation within the district, and the municipal incorporation of the town of Madera." So in the case at bar, the construction of a drainage system for the purpose of draining swamp and overflowed lands adjacent to Long Beach, although the drainage ditches extend through the streets of such city, cannot be deemed a municipal affair. Since the conditions existing, as

where the lands are outside the city limits, or inclusive of lands both in and outside thereof, it becomes a matter of more than local concern. In the case of *Pixley v. Saunders*, 168 Cal. 152, [141 Pac. 815], where a like question was involved, the supreme court said (quoting from the syllabus): "While generally the question of sanitation is a municipal affair, in many instances it is one of broader scope, which cannot be adequately handled by the municipal authorities of a single town. Therefore it cannot be said to be a local or municipal affair within the inhibition of sections 12 and 13 of article XI of the constitution, but it falls within the class of public purposes for which the legislature has the authority to provide governmental agencies or districts by general laws."

In our opinion, there is no merit in petitioner's claim that the ordinance granting consent of the city of Long Beach to the construction of the drainage ditch through its streets is a nullity by reason of the fact that such consent is upon certain terms named in the ordinance. The conditions attached are terms protective of the public interest, germane to the subject, and violative of no provision or principle of the Drainage District Act; indeed, without being attached to the ordinance, they might be and, for aught that appears to the contrary, are incorporated into the specifications for the construction of the ditch through the streets of the city. At all events, since the city might, at its option, deny the use of its streets for the purpose of constructing the canals therein, it could attach any condition, not in conflict with the conditions of the act, which was germane to the subject and calculated to protect the public interest in the streets, thus exercising plenary control over the streets. A similar question arose in the case of *Lake v. Ocean City*, 62 N. J. L. 160, [41 Atl. 427], where it is said: "It has been generally understood that a municipality that may lawfully consent to the formation of a private corporation for certain public purposes may lawfully condition its consent upon terms protective of such public interests, and germane to the subject. If the persons upon whom the stipulations impose terms do not complain, it is difficult to see how others are affected otherwise than beneficially." It is optional on the part of the city whether or not it grant the use thereof for such purpose at all, and likewise optional with the district whether or not it accepts other than an unrestricted grant of such use. We perceive no legal objection, however, to the dis-

trict accepting a conditional grant of the use of the streets where the terms imposed are not inconsistent with the purposes of the act and which it might adopt in doing the work (*Forest City Ry. Co. v. Day*, 73 Ohio St. 83, [76 N. E. 396]), in the absence of such imposed conditions.

3. Section 1 of the act provides for the initiation of the proceeding by filing with the board of supervisors a petition defining the boundaries of the proposed district to be benefited by the construction of the improvement, upon which, after notice given, a hearing is had upon objections filed as provided in said section. While not in express terms authorizing the board to deny the petition, such power to deny, modify, or change, we think, must be deemed implied from the provision of section 5, that "at the conclusion of the hearing, the determinations of the board shall be made in writing to be filed and entered upon the minutes of the board." Nor, in our opinion, is the act subject to the objection that it is void by reason of its failure to provide that the doing of the work shall depend upon its being a public benefit. True, it does not require in direct terms a finding on the part of the board that it shall be a public benefit, though the record discloses that the board did find that the public interest and convenience would be subserved by the doing of the work. In Page and Jones on Taxation by Assessment, section 334, it is said: "Possibly the special and local benefit is clearer in drainage than it is in any other of the public improvements for which assessments are levied. The improvements of drainage, and its beneficial effect upon the land drained are matters of general knowledge which have often been commented upon by the courts." And again (sec. 335): "If land in its natural condition is generally or often covered with stagnant water it is likely to be a menace to public health. . . . Under these circumstances there is no doubt that the drainage of such land, by artificial means, is an improvement which confers a benefit upon the public at large." The supreme court of this state, in the case of *Hagar v. Board of Supervisors*, 47 Cal. 222, in discussing the validity of the Drainage Act of 1868, said: "But we think the power of the legislature to compel local improvements, which, in its judgment, will promote the health of the people, and advance the public good, is unquestionable. In the exercise of this power it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and

perform many other similar acts for the public good, and all at the expense of those who are to be chiefly and more immediately benefited by the improvement." In Lewis on Eminent Domain, second edition, volume 1, section 188, it is said: "The promotion of the public health is undoubtedly a public use within the meaning of the constitution, and private property may be taken for the construction of drains, levees or other works in order to accomplish this object." (See, also, *Laguna Drainage District v. Charles Martin Co.*, 144 Cal. 209, [77 Pac. 933].) The power of the legislature to authorize the doing of the work at the expense of those owning swamp and wet lands who are chiefly benefited by the improvement, is, as we understand the law, founded, like municipal sanitation measures, not only upon its power to do all things necessary to conserve the health and general welfare of the public, but statutes authorizing drainage of swamp-lands are upheld independently of any effect upon the public health as reasonable regulations for the benefit of those who are deemed owners of a common property. (*Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, [41 L. Ed. 369, 17 Sup. Ct. Rep. 56], and cases cited.) And hence the power to act does not depend upon any express provision contained in the act that the board of supervisors shall first determine that it is necessary for the public welfare. Moreover, section 4 of the act makes the determination of the board to proceed with the hearing therein referred to presumptive evidence of the existence of all facts upon which the power of the board to proceed depends.

4. Petitioner suggests that the act in question has been superseded, in so far as Los Angeles County is concerned, by "An act to create a flood control district, to be called 'Los Angeles county flood control district.'" (Stats. 1915, p. 1502.) We are unable to perceive any merit whatsoever in this contention, and agree with counsel for petitioner that "there is a radical difference between the purposes of the drainage act involved in this action and the said Los Angeles county flood control act. The purpose of the drainage act is to dispose of the water and get rid of it as an injurious element; while the purpose of the Los Angeles county flood control act is to conserve it as a beneficial agent." The purpose of one is "to promote the drainage of wet, swamp or overflowed lands"; the other, as declared by the first paragraph of section 2, is "to provide for the control of the flood and

storm waters of said district [which embraces practically the entire county of Los Angeles], and to conserve such waters for beneficial and useful purposes by spreading, storing, retaining or causing to percolate into the soil within said district." The fact that in the proceedings mention is made of the proposed drainage ditch as the "construction of a storm drain," which purpose it might at times serve, is in no wise inconsistent with the purpose declared in the act itself. Certainly it was not the intent of the legislature that by creating a flood control district, embracing almost the entire county of Los Angeles, such act should repeal all provisions for the drainage of wet and swamp lands in the county, any more than by the act under which irrigation districts are created it was intended to destroy all acts providing for the drainage of swamp-lands embraced within such irrigation districts.

While the act is loosely drawn, nevertheless its purpose is clear, and we have reached the conclusion, not without some difficulty, however, that taken as a whole, it affords a means for effecting such purpose, the validity of which is not subject to attack upon the specific grounds urged by petitioner.

It is therefore ordered that the proceedings be affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 16, 1917.

[Civ. No. 1868. First Appellate District.—March 19, 1917.]

MRS. E. J. TOCKSTEIN, Respondent, v. PACIFIC KISSEL KAR BRANCH (a Corporation), Appellant.

SALE—WRITTEN CONTRACT—MERGER OF ORAL NEGOTIATIONS.—A person buying or agreeing to buy personal property, the terms of which purchase or agreement to purchase are put in writing, is bound as to the terms of the contract by such writing, into which all preliminary understandings and assurances are presumed to be merged, and such person cannot go behind such writing to avoid the agreement of purchase for the alleged breach of some oral understanding or guaranty not contained within its written terms.

ID.—CONTRACT PROCURED BY FRAUD—RULE INAPPLICABLE.—The application of the principle that all preliminary oral negotiations are presumably merged in a written contract for the sale of personal property does not operate to prevent a person from avoiding a contract for fraudulent representations which operate as the inducement for entering into it, and upon which the party injured or misled was entitled to rely.

ID.—CONTRACT FOR PURCHASE OF AUTOMOBILE—RESCISSON—FRAUD—EFFECT OF WRITTEN RECITALS.—The purchaser of an automobile under a written contract which provides that the vendor is not to be bound by any agreements not specified therein, cannot rescind the contract and recover the payments made, on the ground that the sales agent of the vendor misrepresented the character of the machine.

ID.—WRITTEN AGREEMENT—RECITALS—EFFECT OF.—A person signing a written agreement which contains upon its face the statement that only the written representations, agreements, and guaranties contained within its terms shall be binding upon the other party to it, cannot rely upon any oral statements made by the agent or representative of such party prior to or at the time of the execution of the written agreement.

ID.—AGENCY—KNOWLEDGE OF AUTHORITY—EFFECT OF.—Where a party freely contracts with an agent knowing the limit of the agent's authority, he may not be heard thereafter to assert that he was misled into believing that the agent had greater authority.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge.

The facts are stated in the opinion of the court.

J. A. Marsh, and A. F. Lemberger, for Appellant.

Daniel O'Connell, for Respondent.

LENNON, P. J.—This is an appeal from a judgment in plaintiff's favor in an action brought by her to recover the sum of \$412.06 as the aggregate of sums of money alleged to have been paid by her on account of the purchase price of a certain automobile from the defendant, and for repairs thereon, which machine is alleged to have proven defective, and in that respect to have violated the terms of certain alleged guaranties given by the defendant to plaintiff at the time of and which constituted the basis of the purchase by her of said automobile; and also to recover the sum of \$420,

damages alleged to have been sustained by the plaintiff through her attempted use of such defective machine.

The complaint is in two counts setting forth separately the foregoing items of the plaintiff's alleged loss and damage. Defendant's answer denies the averments of both counts of the complaint in so far as they involve the breach of any agreement or guaranty on the part of the defendant, or of the Ford Motor Company, its principal, in the sale of the machine. The case was tried before a jury, which rendered a verdict in plaintiff's favor for the sum of \$619, and from the judgment entered thereon for said sum and costs the defendant prosecutes this appeal.

There is little if any dispute between the parties as to the material facts upon which the determination of this appeal must depend. The plaintiff, being desirous of purchasing an automobile for use in the jitney bus service, went to the defendant as the local agent of the Ford Motor Company of Detroit, to procure said car. According to the plaintiff's testimony—which may be taken as true for the purposes of this appeal—she met there a salesman of the defendant to whom she stated that she wanted to buy a Ford car upon installments, and would like to see the car. The salesman informed her that they had not a car in stock to show her at that time, but that all of the Ford cars were sold with a guaranty. He also stated, according to her testimony, that the car would be a new and perfect car, and would be delivered in good shape and would be satisfactory in every way. She thereupon paid the sum of \$50 on account of the purchase price of the car, and at that time there was made out and presented to her, and she signed, a writing denominated upon its face "Sales Contract," and being in the customary form of a leasing or conditional sales agreement, containing a general description of the car, with a statement of the terms of its proposed purchase and times and amounts of deferred payments. This written agreement contained in black type next above the space of its signature the following words: "It is understood that the Pacific Kissel Kar Branch will not be bound by any understandings, agreements or representations, express or implied, not specified herein or covered by our retail sales guaranty duly executed." The plaintiff admits signing this paper, and also admits that a little later and before receiving the car she saw and read and signed another

agreement in which the terms of her purchase of the car were more fully set forth, and in which also the express terms of the guaranty of the defendant and of the Ford Motor Company, the manufacturer of the car, were set forth in detail; and in which it was also stated that "The above comprises in full the entire agreement covering or pertaining to this sale, and no agreement of any kind, verbal understandings or terms whatsoever will be recognized than as embodied and specified herein." The plaintiff read and signed said agreement, and also received a duplicate copy of it, and thereupon received delivery of the car. It was a new car, and was selected, arbitrarily, out of a number of similar cars apparently of the same quality. During the fourteen weeks which followed, the plaintiff used the car in the jitney service, and in motoring generally, driving it in all about four thousand miles. From time to time it was in the shop of the defendant for repairs, and at one time was sent to the Ford Motor Company for the remedy of some unspecified defect. The plaintiff paid for a time her installments upon the purchase price of the car, and also paid on account of said repairs the sum of \$173.60, but finally failed, or refused, to keep up her payments, in consequence of which the defendant retook possession of the car, and undertook to cancel the agreement for its purchase for noncompliance with its terms. Thereupon the plaintiff commenced this action.

We are unable to distinguish this case in principle from other cases recently before the supreme court and this court in which the doctrine is repeatedly restated that a person buying or agreeing to buy personal property, the terms of which purchase or agreement to purchase are put in writing, is bound as to the terms of the contract by such writing, into which all preliminary understandings and assurances are presumed to be merged, and that such person cannot go behind such writing to avoid the agreement of purchase for the alleged breach of some oral understanding or guaranty not contained within its written terms. This is but a restatement of the substance of section 1625 of the Civil Code as interpreted and applied in the following cases: *Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co.*, 153 Cal. 725, [96 Pac. 369]; *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 585, [96 Pac. 319]; *Gardiner v. McDonogh*, 147 Cal. 313, [81 Pac.

964]; *Dollar v. International Banking Corp.*, 13 Cal. App. 331, [109 Pac. 499].

The application of this principle does not of course operate to prevent a person from avoiding a contract for fraudulent misrepresentations which operate as the inducement for entering into it, and upon which the party injured or misled thereby was entitled to rely; and it is upon that theory that the plaintiff has depended to sustain this action and the judgment rendered therein. She asserts that the inducing cause for her agreement to purchase the car in question was the representation of the salesman of the defendant that the car which would be delivered to her would be a new and perfect car and that it was guaranteed perfect in every way, and that she would have no trouble with it; but the testimony of the plaintiff herself shows that at the very time the aforesaid salesman was engaged in making these representations he informed her there was a written guaranty went with the car, while the first writing which she then and there signed not only expressly referred to such guaranty, but also expressly stated that the defendant would not be bound "by any understandings, agreements or representations, express or implied, not specified herein or covered by our retail sales guaranty duly executed." This the plaintiff admits that she saw and signed, and also admits that she signed and received a copy of the amplified agreement between her and defendant at the time that she received the car, in which the express terms of the manufacturer's and seller's guaranty are set forth, and in which it is again expressly stated that the same contains the full agreement between the parties, and that no agreement of any kind and no verbal understandings or promises whatever will be recognized other than as embodied or specified therein. The plaintiff does not pretend to state that she did not sign these writings knowingly and freely, or that any fraud, deceit, or concealment as to their terms and effect existed as an inducing cause for her execution of them; nor has the plaintiff shown in the proofs in this case that any of the terms of the express and limited warranty of the manufacturer and seller of the car set forth in detail in the written agreement, were violated by the defendant or by its principal, the Ford Motor Company.

This state of facts brings this appeal directly within the principle laid down in the case of *Pease v. Fitzgerald*, 31 Cal.

App. 727, [161 Pac. 506], recently decided by this court, wherein it is held that a person, signing a written agreement which contains upon its face the statement that only the written representations, agreements, and guaranties contained within its terms shall be binding upon the other party to it, cannot rely upon any oral statements made by the agent or representative of such party prior to or at the time of the execution of the written agreement. This case is in line with the well-established rule of law that where a party freely contracts with an agent, knowing the limit of the agent's authority, he may not be heard thereafter to assert that he was misled into believing that the agent had greater authority. (*Northern Assurance Co. v. Grand View Building Assn.*, 183 U. S. 308, [46 L. Ed. 213, 22 Sup. Ct. Rep. 133], and cases cited.)

It follows that the judgment herein must be reversed, and it is so ordered.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 17, 1917.

[Civ. No. 1987. First Appellate District.—March 21, 1917.]

LEE ROY E. KEELEY, Respondent, v. HERMAN ERBE, Appellant

CONTRACT—LEGAL SERVICES—EVIDENCE—SUBSTITUTION OF ORAL AGREEMENT FOR WRITTEN CONTRACT—APPEAL.—In an action to recover the reasonable value of legal services, oral evidence is admissible to prove that after entering into a written contract providing for the payment of a contingent fee, the parties entered into a new and distinct oral agreement providing that the plaintiff should be paid a fair fee for his services, and where the court who heard such testimony and saw the witnesses believed the same, and found accordingly, the judgment will not be disturbed on appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John J. Van Nostrand, Judge.

The facts are stated in the opinion of the court.

Oscar Hudson, for Appellant.

Albert Picard, for Respondent.

THE COURT.—This is an appeal by defendant from a judgment in favor of plaintiff in an action brought by him to recover the reasonable value of legal services.

From the record it appears that the parties entered into a written contract, under the terms of which the plaintiff was to render services as an attorney at law for the defendant upon a contingent fee of twenty-five per cent of the value of certain land if title thereto should be obtained for defendant. Subsequently, according to the testimony given by plaintiff, a circumstance was called to his attention for the first time which made the prospect of securing title in the name of the defendant very doubtful; whereupon plaintiff told the defendant "that the situation did not look good to him," and refused to proceed under the contract. They then entered into an oral agreement whereby the plaintiff should proceed to render the agreed services, he to be paid a fair fee, without, however, there being any agreement as to its amount. The defendant denied that there had been a rescission and abandonment of the written contract.

Oral evidence was admissible to prove that the parties entered into a new and distinct agreement as a substitute for the written one (1 Greenleaf on Evidence, sec. 303, p. 4); and while perhaps such testimony under some circumstances should be viewed with distrust, nevertheless in this case the trial court who heard the testimony and saw the witnesses believed the testimony introduced by the plaintiff as to the oral agreement, and found accordingly. We are constrained, therefore, to hold that the judgment of the trial court cannot be disturbed by this court.

Judgment affirmed.

[Civ. No. 2259. Second Appellate District.—March 21, 1917.]

W. W. KAYE et al., Petitioners, v. SUPERIOR COURT OF THE COUNTY OF KERN et al., Respondents.

PROHIBITION—HEARING OF MOTION FOR NEW TRIAL—MOTION ALREADY HEARD—DISMISSAL OF APPLICATION.—While the superior court is without jurisdiction to entertain a motion for a new trial of a case on appeal from a justice's court where the trial was had upon a stipulation of the facts involved, yet where the court has heard and granted the motion after the granting of an alternative writ of prohibition (there being no order in force requiring the court to desist from further proceedings), the writ will not be made peremptory, as no process could be served thereby.

APPLICATION for a Writ of Prohibition originally made to the District Court of Appeal for the Second Appellate District to restrain the Superior Court from hearing a motion for a new trial of a Justice's Court appeal.

The facts are stated in the opinion of the court.

W. W. Kaye, and T. F. Allen, for Petitioners.

Emmons & Johnstone, for Respondents.

THE COURT.—Prohibition. One Newell obtained a judgment in the justice's court against Katze *et al.*, from which defendants appealed to the superior court, where the case was submitted for decision upon an agreed statement of the facts involved. The court adopted the agreed statement as its findings, and gave judgment thereon for plaintiff. Thereafter defendants, pursuant to notice and upon statutory grounds, moved the court for a new trial, which motion for new trial so made by defendants the plaintiff moved to dismiss. The court refused to grant the motion so made by plaintiff to dismiss, and continued to a later date the hearing of defendants' motion for a new trial. Plaintiff then applied to this court for an alternative writ of prohibition directed to the respondent, requiring it to desist from further proceedings in the matter. The application was based upon the ground that the court was without jurisdiction to entertain a motion for new trial of a case on appeal from a justice's court, where the trial was had upon a stipulation of the facts

involved. The writ was granted on November 25, 1916, and by the clerk issued in form prepared and submitted by petitioners' attorneys, requiring respondent to desist from further proceedings or ruling upon defendants' motion for new trial then pending before it, *until the 18th of December, 1916*, instead of until the further order of the court, as required by section 1104 of the Code of Civil Procedure. It appears from the return that after the expiration of said time, to wit, on *December 27, 1916*, the court heard the motion for new trial and granted the same. In so doing, since the command of the writ was merely to desist from any ruling until *December 18th*, there was no violation of the order. It thus appears that the act, the performance of which it was sought to restrain, having been done, and conceding the court acted in excess of its jurisdiction, as to which, upon the authority of *Gregory v. Gregory*, 102 Cal. 50, [36 Pac. 364], *Quist v. Sandman*, 154 Cal. 748, [99 Pac. 204], and *Abbey Land etc. Co. v. San Mateo*, 167 Cal. 434, [Ann. Cas. 1915C, 804, 52 L. R. A. (N. S.) 408, 139 Pac. 1068], we entertain no doubt; nevertheless no purpose could be served by making the writ peremptory. Indeed, as it now appears, the record presents a moot question; and the proceeding, without prejudice to the right of the petitioners to apply for such other and further writ in the premises as they may deem advisable, is dismissed.

[Civ. No. 1630. Third Appellate District.—March 21, 1917.]

DAVID WHILDIN et al., Respondents, v. MARYLAND GOLD QUARTZ MINING CO., Respondent, and EUREKA GOLD MINING CO., Appellant.

MINING LAW—PATENT UNDER ACT OF 1866—RIGHT TO FOLLOW VEIN.—

Under the Federal Mining Act of July 26, 1866, a patent to a lode claim grants the fee of the land including so much of the lode as apexes within the exterior surface boundaries of the land, with the right to follow the vein on its dip, and nothing more.

APPEAL from a judgment of the Superior Court of Nevada County, and from an order denying a new trial. George O. Jones, Judge.

The facts are stated in the opinion of the court.

Chas. W. Kitts, and John Mulroy, for Appellant.

F. T. Nilon, and Nilon & Arbogast, for Plaintiffs and Respondents.

Fred Searls, for Defendant and Respondent.

BURNETT, J.—The action was one to quiet plaintiffs' title to a small parcel of mining ground lying easterly of and adjoining the surface boundaries of defendant Eureka Gold Mining Company's patented land, known as the Eureka quartz mine. The land claimed by plaintiffs is designated as East Eureka quartz mine, and is an irregular shaped parcel surrounded on all sides by patented mining claims. Plaintiffs claim that, on the fifth day of September, 1897, the land embraced within the exterior boundaries of the East Eureka quartz mine was public mineral land of the United States, open to exploration and purchase; that, on said date, one Stephen Maynard, a citizen of the United States and the predecessor of the plaintiffs in interest, having discovered a lode or vein of gold-bearing rock in place within the exterior boundaries of said parcel of land, made a valid mining location of said parcel, to be known as the East Eureka quartz mine, that the labor and improvements necessary in order to hold said mining claim under the federal mining laws were done and performed each year by said Maynard and the plaintiffs as his successors in interest. There is no controversy as to the technical formality of said location, the posting of the notice, the marking of the boundaries or the performance of the necessary labor to hold the claim.

Appellant Eureka Gold Mining Company claims only a portion of the land embraced within said location, and it bases its claim to this upon a certain mineral patent, dated September 13, 1869, issued by the land department of the United States to the Eureka Gold Mining Company for lot No. 41 in the northeast quarter of section 26, township 16 north, range 8 east, M. D. M., containing 23.29 acres, together with the lode 1,664 feet in length. This patent was based upon a location of one thousand seven hundred feet of the Eureka ledge, made December 9, 1865, as indicated by the following:

“Notice of Location.

“Notice is hereby given that the undersigned have this day located and taken up for mining purposes, seventeen claims of one hundred feet each on the quartz lode or vein known as the Eureka ledge situated upon Eureka hill, about one mile easterly from the town of Grass Valley, Nevada County, California, commencing at a point on said ledge at which this notice is posted, forming the westerly boundary of the claims of the Idaho Mining Company, and extending thence westerly seventeen hundred feet upon and following the said Eureka ledge to a large pine tree forming the eastern boundary of the claims of the Rowanaise Company, with all the dips, spurs, angles and variations of said ledge.”

About 164 feet of the Eureka ledge or lode attempted to be granted by appellant's mineral patent lies outside of and beyond the exterior surface boundaries of plaintiffs' mining location, and the right of ownership of these 164 feet of said ledge presents the important issue in the case.

The determination of this matter involves, of course, the question whether this particular part of the lode was subject to location on September 5, 1897, when the predecessor of plaintiffs gave notice of his claim; in other words, whether it was then a part of the public domain. This must depend upon the consideration whether appellant's patent to lot No. 41 and 1,664 linear feet of the Eureka ledge carried and conveyed that portion of the strike which lies beyond the exterior surface boundaries of said lot. If it was operative to vest title to said portion, manifestly, appellant must prevail; otherwise, the order of the trial court must be affirmed.

Respondents' position is “that the Eureka patent granted the fee of lot No. 41 including so much of the Eureka lode as apedex within the exterior surface boundaries of said lot, with the right to follow the vein on its dip *and nothing more*; and that as to the portion of the lode which lies beyond the exterior boundaries of lot No. 41, the patent is invalid and inoperative.” Furthermore, it is contended that “appellant has the choice of two courses. Either it could rely upon its old location and possessory right of so many linear feet along the ledge, with its attendant burdens of annual labor, etc., without certain and defined surface rights, or it could proceed to patent, have its lode and selected surface ground officially

surveyed and platted, and receive from the government a mineral grant for something certain and defined, thus relieving itself from the burdens mentioned and making certain what was theretofore indefinite. Appellant chose the latter course and it must abide its choice."

We think there can be no doubt, under the decisions, of the correctness of respondents' view of the case. If the patent had been issued under the statute of 1872 even appellant would probably not contest the proposition affirmed by respondents, but no different conclusion can be reached from a proper interpretation of the law of 1866 under which appellant claims, although said statute is not so explicit and certain as the later enactment of Congress.

The second section of the Federal Mining Act of July 26, 1866, provides: "Whenever any person claims a vein or lode of quartz, bearing gold, having previously occupied and improved the same according to the local customs or rules of miners of the district, and having expended in labor and improvements thereon an amount of not less than one thousand dollars, etc., it shall be lawful for said claimant to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." The use of the terms "entry" and "tract" clearly implies a surface location, and it is the "tract" for which the patent is granted. The language is opposed to the contention that the patentee may claim the ledge on its course or "strike" beyond the extreme boundaries, although he may follow the lode on its "dip" beyond the lateral lines. It makes no difference what the actual location may have been, or what is permitted by the local mining rules or customs. The statute prescribes the measure for the issuance of the patent, and the muniment of title therein authorized cannot be extended or enlarged by any act of the administrative officers of the government.

That the patent must be thus defined and limited in its operation has been decisively stated by the courts. One of the early cases is *Wolfley v. Lebanon Mining Co.*, 4 Colo. 112. There the patent to what was known as the "Ben Harding"

lode was issued under the act of 1866 and contained the following language: "It being the express intent and meaning of these presents to convey to the said J. Warren Brown, his heirs and assigns, only the eight hundred linear feet of the Ben Harding lode, with surface ground hereinbefore described, commencing at the discovery shaft of said lode, and extending thence westerly eight hundred feet along the course of the vein, the same being known as claims Nos. 1, etc., . . . with the right to follow said Ben Harding lode or vein to the distance of eight hundred linear feet, with its dips, angles and variations, to any depth, although it may enter the land adjoining." In reference to the claim of the right to follow the vein in its course beyond the exterior boundaries of the surface location the court said: "It is, however, insisted that if not by the literal terms of the act of July, 1866, then by virtue of territorial legislation and local customs and rules of miners, the patentee was entitled to follow the course of the discovered lode, whether it was comprised in his location or not; that one of the purposes of the act of Congress was to recognize and confirm mining rights and titles as they existed under local laws and customs; that whatever may be the true construction of the act as to locations made subsequent to its passage, as to locations made prior thereto, it authorized the issuance of a patent for a lode located in conformity with the rules and customs of the mining district in which it was situated, even though it might depart in its linear course from the lateral boundaries of the described premises." After a reference to the status of the claimant and possessor before the issuance of the patent, the court declares: "A title in fee, by patent, is offered him, which he may, at his pleasure, accept or reject. By the statute his rights are circumscribed and determined. The act of Congress, from which they sprung, is paramount to all local rules, laws and customs. . . . It is in the light of its provisions that every patent issued in pursuance thereof must be construed, and we cannot, therefore, admit that any such patent can, by virtue of local laws and customs, transfer to the patentee any greater interest or estate than that which the paramount law warrants." Quoting from the opinion of Judge Sawyer in the case of *Chapman v. Toy Long*, 4 Sawy. 34, [Fed. Cas. No. 2610], to the effect that the locator has the choice of remaining in the possession of the mine and developing and appropriating

its mineral deposits, or of taking steps to purchase it and secure a patent therefor, it being a matter left to his own option or sense of self-interest, the court proceeds to say: "The patent operates to convey not only the circumscribed tract of land which, under the claimant's direction, he has platted, but also the lode contained therein, with the right to follow the same in its downward course into adjoining premises, but not to follow it when, on its downward course or strike, it departs from the vertical side-lines. In the latter case, after its departure, it is the subject of location by whomsoever it may be discovered." It was therefore held that the plaintiff was not entitled to the portion of the lode in its course beyond the patented side-lines. The case was, manifestly, carefully considered and ably expounded by the Colorado supreme court.

Two interesting and noted Utah cases are also brought to our attention, both involving the same question.

In *McCormick v. Varnes*, 2 Utah, 355, the notice of location covered some two thousand two hundred feet of the lode and the patent corresponded with it, but only about one hundred feet were covered by the surface boundaries, and it was held that the patentee in his title was limited to this description, the court declaring that "it is clear that the government did not intend by the act of Congress of July 26, 1866, to authorize the miner to locate, or itself to grant, two separate and distinct estates in a mining location, one in the surface ground, and the other in the vein or lode, wherever the latter might be found to run in its course, without regard to the surface ground." It is pointed out that under the common law the claimant would be entitled only to whatever might be over and under the surface of a segment of the earth, carved out by the extreme lines of the location extended downward indefinitely, and that the said statute of 1866 operated to qualify or enlarge this right in one respect only, and that is, to the extent that the claimant "may follow the lode from the apex found within the surface ground, on its dip to any depth, although in its course downward it may so far depart from a perpendicular as to enter the land adjoining. . . . But he cannot go beyond or outside of his side-lines on the course or strike of the vein."

The other Utah case, *Tarbet v. Flagstaff Min. Co.*, went to the United States Supreme Court on appeal and is reported

in 98 U. S. 463, [25 L. Ed. 253], and the rulings of the Utah supreme court similar to those in the McCormick case, *supra*, were upheld. The rule was also laid down that a location made crosswise of a lode or vein, so that its greatest length crossed the same instead of following the course thereof, will secure only so much of the claim as it actually crosses at the surface, and its side-lines will become its end-lines for the purpose of defining the rights of the owner. The same theory that is held by appellant herein was embodied in a proposed instruction that was refused by the lower court and the supreme court of the United States declared that the ruling was correct. The proposed instruction was as follows: "By the act of Congress of July 26, 1866, under which all of these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode, as such, irrespective of the surface area, which the applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area; and the patentee under the act takes a fee-simple title to the lode, to the full extent located and claimed under said act." It was declared that the true construction of the act of Congress of 1866 is: "That the owner of a mining right in a lode or vein cannot follow the course of the vein beyond the end-lines of his location extended perpendicularly downward, and that he may follow the dip to an indefinite distance outside of his side-lines."

The foregoing case is followed in *Del Monte M. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S. 75, [43 L. Ed. 72, 18 Sup. Ct. Rep. 895], wherein the subject is learnedly reviewed by the court through Mr. Justice Brewer and it is declared that "the express purpose of the statute of 1866 was to grant the vein for so many feet along its course, yet such grant could only be made effective by a surface location covering the course to such extent."

In *Walrath v. Champion Min. Co.*, 63 Fed. 552, the acts of 1866 and 1872 are compared and it is declared by Judge Hawley: "A survey of the surface ground must be made before it can be patented and the surface lines of such survey should be marked upon the ground, whether patented under the law of 1866 or 1872. The intent of both acts, in this

respect, is substantially to the effect that the mining locations made thereunder should be along the lode lengthwise, and the surface boundaries should be marked upon the claim. It was not intended by either act that the locator would have any right to follow the lode upon its strike beyond the surface lines of his location. The term 'location' as used in both acts refers to the surface ground as well as to the vein or lode. The lode claim, whatever its nature, character, or extent, is to be limited to the survey of the surface location, and the title to the lode upon its strike is not given to any portion thereof which departs beyond the surface lines of the location."

Montana Ore Purchasing Co. v. Boston & Montana etc. Min. Co., 20 Mont. 336, [51 Pac. 159], is an instructive case from Montana, very much in point here. The patent called for 2.98 acres of land, more or less, "and 1,318 linear feet of the said Rarus vein, lode, ledge or deposit of the length hereinbefore described," etc. The court said: "While it is often true that the surface of mining ground is often spoken of in the decisions of the courts as an incident to the vein whose apex lies within or under it, we are clearly of the opinion that the mining statutes of the United States contain no authority for the conveyance of the lodes or veins embraced in a located quartz claim independently of the surface ground connected with *and containing or overlying them*. *Neither is the subject of patented grant by itself* What did the Rarus patent convey? The patent conveys an area of 2.98 acres and no more. . . . In so far as the patent attempts to convey the Rarus lode on its strike, independently of the granted surface of 2.98 acres, it is void and of no effect."

Other similar decisions are cited by respondents but the foregoing would seem to set the matter at rest.

It is true, as pointed out by the Montana court, that certain expressions are used in the statutes that apparently favor appellant's position, but the phraseology results from the fact that the lode is the actual thing in interest and the principal subject that is contemplated. However, as pertinently declared: "Such expressions and such provisions cannot avail to permit the grant of lodes or veins embraced in a located quartz claim regardless of the surface connected therewith." There are certain expressions, also, in some of the decisions

of the courts that lend color to the contention that title to the lode independent of the surface boundaries may be acquired, but they are not to be taken as laying down the law in the premises.

Appellant also seems to find some comfort in certain statements contained in sections 58 and 59 (3d ed.) of Lindley on Mines. It is apparent, though, that the learned author is therein dealing largely with the mining rules and regulations as to the location of claims and with the opinions of the land department of the government. However, when we look at section 60 we find this declaration: "The courts of last resort have uniformly overruled the interpretation of this act adopted by the land department, and have established the rule that surface lines, both side and end, were contemplated by the act of 1866, and that when a patent was once obtained the patentee was not permitted to follow the vein on its course beyond the surface boundaries."

Then, in section 71, Judge Lindley compares the two acts of 1866 and 1872 and, in reference to the former, makes this comment: "The act of 1866 left the manner of locating these claims to local regulation, limiting the linear extent of each individual claim to two hundred feet, except in case of the discoverer, and to a maximum of three thousand feet to an association of persons.

"We have seen that under the local rules locations were made of the *vein* and a given number of linear feet on the course was claimed; also, that prior to patent the locator could follow that vein, wheresoever it might run, to the extent claimed. His surface ground was for the convenient working of his lode, and its extent was regulated entirely by local custom. His right to the vein in length or depth was not dependent upon the form or extent of the surface ground. When he applied for and received a patent, he received title to but one lode, and could only follow that on its course to the extent which it was included within his surface lines. While end-lines were implied, his right to pursue the vein in depth was not based upon their substantial parallelism." He then proceeds to state what changes were effected by the statute of 1872, but we need pursue the subject no further.

We may say in conclusion that the principal mistake made by appellant lies in the assumption that the location and the patent are governed by the same rule. As pointed out, the

location, prior to 1872, could be made of the lode without regard to the surface boundaries, but under the patent the locator was limited to the lode within the designated lines on the surface of the ground. When appellant applied for its patent it undoubtedly might have included surface ground for the entire length of the lode claimed by it, but it chose to take 23.29 acres along about one thousand five hundred feet of the vein and no surface ground for the remaining 164 feet, and it filed in the local land office its plat showing such choice.

We feel satisfied that the judgment is just and legal and the order denying the motion for a new trial is therefore affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 20, 1917, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 17, 1917.

[Civ. No. 1877. First Appellate District.—March 22, 1917.]

FRANZ BRAUN. Respondent, *v.* **ARTHUR VALLADE**
et al., Appellants.

NEGLIGENCE—FALL THROUGH OPEN TRAPDOOR IN SALOON—LIABILITY OF OWNERS TO INJURED PARTY.—Where a person entered a saloon for the purpose of using the toilet, and after doing so returned to the barroom and ordered a drink, and after being served walked across the room to examine a picture hanging on the wall, and in doing so fell into an open trapdoor and was injured, the relation of the injured party to the saloon owners at the time of the injury was that of a customer to whom the latter owed the duty of ordinary care, and such duty was violated by leaving such trapdoor open and unguarded in that portion of the floor space which was open and accessible to customers.

Id.—DUTY TO GUARD TRAPDOOR—CONFUSING INSTRUCTION—CURE BY OTHER INSTRUCTION.—An instruction that if the defendants in the conduct of their business negligently opened and left open and not properly guarded or obstructed a trapdoor in the floor of the saloon, and that such trapdoor was then a part of such barroom

and open to the use of patrons, customers, and the public, and plaintiff was lawfully on the premises, and such negligence and not plaintiff's negligence was the proximate cause of the injuries, the jury should find for the plaintiff, while confusing as to whether reference was made to the floor space filled by the trapdoor when closed or to the spaces below the trapdoor when open, such confusion is cured by the instruction that if a part of the premises where the trapdoor was located was private and not open to the public, and the public did not have access thereto, the defendants were not required to maintain guards around the trapdoor.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

S. C. Wright, for Appellants.

J. Dimmer, and E. D. Knight, for Respondent.

LENNON, P. J.—This is an appeal from a judgment in plaintiff's favor in an action for damages alleged to have been sustained by him by reason of his having fallen through an open and unguarded trapdoor in the floor of certain premises occupied and used by the defendants in the conduct of a saloon.

There is little, if any, disagreement between the parties respecting the main facts of the case. The defendants on the tenth day of July, 1914, were engaged in conducting a saloon known as the Minneapolis Bar on Market Street in the city and county of San Francisco. On said day the plaintiff entered the said place of business of the defendants for the purpose, according to his testimony, of using the toilet attached to and in the rear of the saloon. Having done this and returned to the barroom the plaintiff, not wishing, as he stated, to use the convenience of any place without some return, went to the bar and ordered a drink of beer; and having been served and begun to drink it he observed a picture upon the opposite wall of the saloon, and being interested in painting walked across to examine it, and in so doing fell into an open trapdoor, and was precipitated into the basement, suffering severe injuries. There is some conflict in the evidence as to whether the space in front of where the picture hung, and of which the trapdoor when closed formed a part

of the floor, was a portion of the open or public area of the saloon; or was separated therefrom by a piano and other obstructions, indicating that it was private and not intended for public use; but in respect to this matter the plaintiff himself testified that there was no obstruction between the bar and the picture, and that he walked directly across the room toward it and to the open space into which he fell. There is also some evidence that upon the wall above the trapdoor there was a large cardboard sign reading "Private. Keep out"; but there was evidently some question as to whether this sign referred to the floor space in front of the picture partly occupied by the trapdoor when closed, or to the basement and entrance into it when the trapdoor was open. The jury resolved these doubts in the plaintiff's favor, and we are not asked to review their discretion in respect to these conflicts in the evidence. The appellants, however, urge as their main contention in the case that the undisputed evidence does show that the plaintiff having entered upon the premises for the purpose indicated by his own testimony, became and was throughout the period of his presence there a mere licensee toward whom, as such, the defendant owed no duty other than that of refraining from causing him an injury by a willful or grossly negligent act. In support of this contention the appellants chiefly rely upon the case of *Kneiser v. Belasco-Blackwood Co.*, 22 Cal. App. 205, [133 Pac. 989], as indistinguishable from the case at bar. The facts of that case were briefly these: The plaintiff had entered the saloon of the defendant desiring to sit down and rest, and to visit the toilet which he knew to be located in the basement. He had not intended to patronize the bar as a customer, but was induced by the invitation of others already in the place to partake of one or more drinks of liquor, after which he proceeded to go to the basement of the place in pursuit of his original intention to visit the toilet there. While going down the stairs leading thereto his foot caught upon a projecting nail, and he fell and was injured. The court held upon these facts that the plaintiff was a mere licensee, and as such was not entitled to recover. It seems to us, however, that the distinction between the above case and the present one is clearly outlined by a comparison of the facts of each. In that case, as in the present one, the act and intent of the plaintiff in entering the premises of the

defendants for the purpose of making use of the toilet rendered him a mere licensee so long as that intent and purpose was maintained, or was returned to if departed from; the act of the plaintiff in the foregoing case in drinking at the request of others may have changed his relation to the defendants from that of a mere licensee to that of a customer; but, if so, the proofs in that case showed that the plaintiff therein resumed his former relation of licensee when he returned to his primary intent and purpose to use the defendants' toilet, and was proceeding to carry out that intent and purpose at the time of his injuries. In the case at bar, however, the plaintiff having entered the defendants' premises with an intent and purpose which under the foregoing case would have constituted him a mere licensee, appears to have fulfilled that purpose and terminated that relation when, upon returning from the toilet to the barroom, he determined to become, and did in fact become, a customer of the defendants by ordering and partaking of a drink at their bar. From the moment of his changed intent and action his relation to the defendant changed from that of a mere licensee to that of a customer, to whom the defendants would owe the duty of ordinary care—a duty which it is conceded would be violated by negligently leaving an open and unguarded trapdoor in that portion of the floor space of the barroom which was open and accessible to customers. We think that the evidence in this case sufficiently shows that the plaintiff stood in the relation of a customer to the defendants at the time of his injuries, and that these were caused by the appellants' negligent act.

The appellants further contend that the trial court erred in giving to the jury the following instruction:

"The court instructs the jury that if they believe from all the evidence that the defendants in the conduct of their business mentioned in the complaint at the time of the injuries to plaintiff, carelessly and negligently opened and left open and not properly guarded or obstructed a trapdoor in the floor of said saloon, and that said trapdoor was then a part of said barroom and open to the use of patrons and customers and to the public, and that plaintiff was lawfully upon said premises, and that such negligence, and not negligence on the part of plaintiff, was the proximate cause of the injuries to plaintiff, they should find for the plaintiff."

It may be, and in fact is practically conceded on the part of the respondent, that the foregoing instruction is confusing in its reference to the "trapdoor in the floor of said saloon" as being a part of said barroom and "open to the use of patrons and customers and to the public," the doubt being as to whether these phrases refer to the spaces below the trapdoor when open or to the floor space filled by the trapdoor when closed. If understood in the latter sense the instruction would not be subject to the appellants' criticism; nor would it in our opinion be liable to the objection that it invaded the province of the jury by charging as to matters of fact. Aside from this, however, we think that whatever confusion may have arisen from the doubtful meaning of the foregoing instruction was sufficiently cured by the court in the rest of its instructions, and particularly in the following one, given at the request of the appellants:

"I charge you that if you believe from the evidence that the part of the premises where the trapdoor was located was private and not open to the public, and the public did not have access thereto, then I charge you that the defendants were not required in law to maintain guards or barriers around said trapdoor."

The final contention of the appellants is that the court erred in refusing to give certain instructions requested by them upon the subjects of contributory negligence and proximate cause. The record discloses, however, that the court quite fully and correctly charged the jury upon these subjects, and hence was justified in refusing to give an added instruction thereon in the particular form requested by the defendants.

Judgment affirmed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1911. First Appellate District.—March 22, 1917.]

MRS. ROSIE FIORI, Respondent, v. L. F. AGNEW et al., Appellants.

FALSE IMPRISONMENT—MISCONDUCT OF COUNSEL—IMPROPER REFERENCE TO FAILURE TO TESTIFY—VERDICT—LACK OF PREJUDICE.—In an action for false imprisonment instituted against certain members of a city police department, a remark made by plaintiff's counsel in his closing argument that the reason why two of the defendants did not appear and testify was because if they had so appeared the plaintiff would have picked them out as the officers who had called upon her to get hush money to permit her to pursue the illicit vocation of prostitution, was not prejudicial, where the arrest was illegal, and the action for twenty-five thousand dollars damages and the verdict for five hundred dollars.

ID.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE—QUESTION FOR TRIAL COURT—APPEAL.—On a motion for a new trial upon the ground of newly discovered evidence, where the evidence proffered upon the motion is cumulative of evidence offered upon the same general subject during the trial, the determination of the question as to whether a new trial should be granted or refused upon that ground is peculiarly within the province of the trial court, and a clear abuse of discretion must be shown before the order of the trial court will be disturbed on appeal.

APPEAL from a judgment of the Superior Court of Alameda County. James G. Estep, Judge presiding.

The facts are stated in the opinion of the court.

James M. Koford, G. E. Jackson, and John J. Earle, for Appellants.

James P. Montgomery, for Respondent.

RICHARDS, J.—This is an appeal from a judgment in favor of plaintiff in an action for false imprisonment instituted by her against the defendants, who are members of the police department of the city of Oakland, and by whom the plaintiff alleges she was arrested and imprisoned without probable cause and without rightful authority of law. The

cause was tried before a jury, which returned a verdict in her favor for the sum of five hundred dollars and costs.

Upon this appeal the first and main contention of the appellants is that the counsel for plaintiff was guilty of prejudicial misconduct during his closing argument in the case. The particular act of misconduct for which appellants seek a reversal of the judgment arises out of the following facts: While a witness the plaintiff testified that shortly before her arrest two unidentified police officers of said city had called upon her with a proposition that upon payment of hush money she would be permitted to pursue the illicit vocation of a prostitute unmolested by the authorities, and that she had rejected their proposition. This episode not having been connected in any way with the defendants the plaintiff's testimony regarding it was upon motion stricken out. During the trial two of the defendants did not take the witness-stand; and in his closing argument to the jury counsel for plaintiff proceeded to comment upon their failure to do so, when the following occurred:

“Mr. Montgomery: ‘Why were they not brought here, gentlemen of the jury, those other two officers?’—

“A Juror: ‘Why was that?’

“Mr. Montgomery: ‘Because she would have picked out the man that made the demand for the money.’”

Counsel for defendants promptly objected to this remark of plaintiff's counsel, and assigned the same as error, and requested the court to instruct the jury to disregard the same. Some discussion followed, in which the court seemed inclined to allow the remark to stand, under the impression apparently that the testimony of plaintiff upon which it was predicated had not been stricken out; but upon being convinced to the contrary, the court admonished counsel for the plaintiff that he would have no right to comment upon it, and also proceeded to credit the jury with having good common sense to distinguish between evidence and argument, and to state that the jury were to understand that the remark of counsel was simply argument.

It may be conceded that the remark of counsel for plaintiff made in response to this question of a juror in the heat of the closing argument of a case in which throughout there had been considerable heat, was improper; and it may also be conceded that the remarks of the court in response to the objection, as

signment, and request of counsel for the defendants were not as strong in their admonition to the jury as the occasion required. Still, the question that this court is to determine is whether from an inspection of the entire record the objectionable remark of counsel for plaintiff was sufficient to create in the minds of the jury such a degree of passion and prejudice as to cause their verdict to amount to a miscarriage of justice. The demand of the plaintiff was for the sum of twenty-five thousand dollars damages for an arrest made without complaint or process, and which was therefore illegal, and as to its succeeding imprisonment false, unless, as contended by the appellants, the plaintiff was a vagrant, and thus subject to arrest at any time without warrant. As to this phase of the case the evidence was conflicting; and the jury, as it was its province to do, resolved the conflict in plaintiff's favor, and yet only awarded her damages in the sum of five hundred dollars. We cannot say that this modest verdict was the result of either passion or prejudice on the part of the jury amounting to a miscarriage of justice, and hence cannot hold that the objectionable remark of counsel for the plaintiff was sufficiently prejudicial to justify a reversal of the case.

The next contention of the appellant relates to the alleged error of the court in refusing to give certain instructions requested by the defendants as to the preponderance of proof required of the plaintiff in order that she should be entitled to recover for injuries to her credit, reputation, and good name. An examination of the entire body of instructions given by the court shows that these matters were fully covered thereby, and hence that the court committed no error in its refusal to give the said instructions of the defendants in the particular form in which they were requested.

It is also contended by the appellants that the court erred in refusing to give the instructions asked by them upon the subject of vagrancy, and of the right of officers to arrest those guilty of prostitution amounting to vagrancy at any time without a warrant; but the record shows that the court modified the instructions requested by the defendants upon this subject so as to correctly state the law, and gave to the jury such modified instructions; and since, as we have seen, the evidence upon the issue as to whether plaintiff was living in a state of prostitution amounting to vagrancy at the time of her arrest, or had reformed from her past conduct of life in

these respects, was conflicting, no error can be predicated upon the instructions of the court or finding of the jury upon that issue.

The other errors of law alleged to have been committed by the court in its rulings upon the admission of evidence are not sufficiently meritorious as to require separate comment.

The final contention of the appellants is that the court should have granted a new trial upon the ground of newly discovered evidence. The evidence proffered upon the motion for a new trial was cumulative of evidence offered upon the same general subject during the trial; the determination of the question as to whether a new trial should be granted or refused upon that ground is peculiarly within the province of the trial court; and the case as presented to this court must clearly show an abuse of discretion before the order of the trial court in either granting or refusing a new trial upon that ground will be reversed upon appeal. (*Cahill v. Stone*, 167 Cal. 126, [138 Pac. 712]; *People v. Selby S. & L. Co.*, 163 Cal. 84, [Ann. Cas. 1913E, 1267, 124 Pac. 692]; *Oberlander v. Fixen Co.*, 129 Cal. 692, [62 Pac. 254].)

No other grounds of error being urged, the judgment is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 21, 1917. Melvin, J., dissented from the order denying a hearing in the supreme court.

[Civ. No. 1871. First Appellate District.—March 22, 1917.]

RAYMOND J. SQUIRES, Appellant, *v.* CHARLES V. ESTEY, Respondent.

QUIETING TITLE—VOID TAX DEED—CONDITION OF RELIEF—REIMBURSEMENT OF PURCHASER AT TAX SALE.—Where the owner of property comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which will in effect invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to

the tax purchaser, or his grantee or assignee, the taxes, penalties, interest, and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession, regardless of the fact that the assessments and levies of taxes were void on account of numerous defects and irregularities.

Id.—RIGHT OF REIMBURSEMENT—EQUITY.—The right of the purchaser of a tax title upon his deed being declared invalid to recover the amount paid out by him for taxes, penalties, costs, interest, and charges, rests upon equitable principles, and is not dependent upon section 3898, subdivision 5, of the Political Code, as amended in 1913.

APPEAL from a judgment of the Superior Court of Alameda County. J. J. Trabucco, Judge presiding.

The facts are stated in the opinion of the court.

L. A. Kottinger, and Milton Shepardson, for Appellant.

John G. Lawlor, for Respondent.

RICHARDS, J.—This is an appeal from the judgment in defendant's favor in an action commenced by the plaintiff, as the owner of a certain tract of land, to quiet title thereto against the defendant claiming under a tax deed. The defendant in his answer and cross-complaint set up his tax deed as a defense to the action, and also averred that he had paid out and expended the sum of \$905 as taxes, penalties, costs, interest, and charges which were assessed and a lien upon said property at the time he obtained said tax deed to the same, and the payment of which was a condition precedent to the issuance of said tax deed; and the defendant prayed that should the court find his tax deed for any reason invalid, and adjudge the plaintiff to be the owner of the property, it should also in its judgment decree that the plaintiff be required to repay to the defendant the sums so expended. Upon the issues as thus made up the trial court found the defendant's tax deed to be invalid, but directed the repayment to the defendant by the plaintiff of the sum of \$835.90 so expended by him for taxes and so forth, and decreed that its judgment quieting the plaintiff's title should be ineffectual until such sum

was paid. From this judgment the plaintiff prosecutes this appeal.

The main contention of the appellant is that the various items of taxes, etc., alleged to have been paid by the defendant as a prerequisite to the issuance to him of the tax deed, were based upon assessments and levies of taxes by the state and by the city of Oakland which were void on account of numerous defects and irregularities as shown in the proofs and pointed out in the briefs of appellant. Conceding that such defects and irregularities exist, and that they were such as would have rendered void the tax deed issued to the defendant, and uncollectible the taxes based thereon in any proceedings initiated by the state to compel the plaintiff as the owner of the property to pay the same, or even in any proceeding initiated by the defendant to quiet his title to the property, we are still unable to distinguish this case from the case of *Holland v. Hotchkiss*, 162 Cal. 366, [L. R. A. 1915C, 492, 123 Pac. 258], wherein the rule is laid down that "Where the owner comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which will in effect invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, or his grantee or assignee, the taxes, penalties, interest and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession." It is contended, however, by the appellant that this rule has only application to cases where the assessment and levy of the taxes sought to be recovered were so far legal as to have created a lien upon the property. But the case above cited does not make this distinction in its application of the broad principle that he who seeks equity must do equity; but on the contrary the most recent cases which are cited therein as upholding the doctrine, or which have been decided since, are cases in which the assessments and levies of taxes were void for irregularities as vital as those relied upon by the appellant in the case at bar, notwithstanding which the owners of the property going into a court of equity, seeking the equitable relief of a decree quieting their title as against void tax deeds, were required in each case to pay or offer to pay a sum equal to the taxes which

would be justly due. (*Couts v. Cornell*, 147 Cal. 560, [109 Am. St. Rep. 168, 82 Pac. 194]; *Savings & Loan Soc. v. Burke*, 151 Cal. 616, [91 Pac. 504]; *Campbell v. Carty*, 162 Cal. 382, [123 Pac. 266]; *Johnson v. Carty*, 162 Cal. 391, [123 Pac. 263]; *Cordano v. Kelsey*, 28 Cal. App. 9, [151 Pac. 391, 398].) Upon the authority of those cases we find no merit in the foregoing contention on the part of the appellant.

The appellant also contends that the defendant's amended answer and cross-complaint were insufficient in respect to their affirmative averments as to the details of the assessment and levy of the taxes sought to be recovered. We are of the opinion that however uncertain and indefinite the defendant's pleading may be in the respects indicated, it was sufficient to raise the issue in the absence of a special demurrer.

As to the appellant's contention that section 3898, subdivision 5, of the Political Code as amended in 1913 [Stats. 1913, p. 560], is void in its attempted application to assessments and levies of taxes made before the passage of such amendment, it is sufficient to say that the respondent's right to a recovery in the case at bar does not depend upon this or any other section of the code, but rests upon a principle of equity well established in the decisions of the courts long prior to the amendment of the code.

Judgment affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 21, 1917.

[Civ. No. 1849. First Appellate District.—March 22, 1917.]

GEORGE W. McGINN, etc., Plaintiff, Appellant, and Respondent, v. MRS. HELEN REES, Defendant and Appellant; MARK REES, Defendant and Respondent.

SUMMONS—SERVICE OF COPY OF COMPLAINT—JURISDICTION.—Under the provisions of section 410 of the Code of Civil Procedure, the service of a copy of the complaint with the summons is essential to give the court jurisdiction.

ID.—VARIANCE BETWEEN COMPLAINT AND COPY SERVED—MINOR DIFFERENCES—DEFAULT JUDGMENT—JURISDICTION—VACATION OF JUDGMENT UNWARRANTED.—The setting aside of a default judgment for want of jurisdiction on the ground that the defendant was not served with a copy of the complaint on file in the action, as required by section 410 of the Code of Civil Procedure, is unwarranted, where there existed only minor differences between the complaint on file and the copy served, the most important of which was the omission from the copy of one of the names of the defendants contained in the filed complaint, and the summons served contained the omitted name.

ID.—REMEDY OF DEFENDANT.—Under such circumstances, if the defendant desired to test the sufficiency of the service, she should have appeared and by an appropriate motion raised the question, instead of waiting until judgment was taken against her and then claiming it was a nullity because of such differences.

ID.—SETTING ASIDE SERVICE OF SUMMONS—PREJUDICE OF SUBSTANTIAL RIGHTS.—A motion to set aside the service of a summons will be denied unless it is shown that the substantial rights of the defendant are affected.

ID.—AMENDMENT OF RETURN OF SUMMONS—SERVICE ON DEFENDANT SUED UNDER FICTITIOUS NAME—JUDGMENT.—Where a complaint names fictitious defendants, and process is served upon a person not named in either the complaint or summons, and default judgment is entered against the person so served, without amendment, it is the duty of the court to permit the plaintiff thereafter upon motion to amend the return of proof of service of summons so as to make it show that the person served was the person sued under the fictitious name.

ID.—DEFENDANT SUED UNDER FICTITIOUS NAME—JUDGMENT—FAILURE TO SUBSTITUTE TRUE NAME—IRREGULARITY—APPEAL.—Where a defendant is sued under a fictitious name and served with process, the failure to amend the complaint so as to state his true name, is but an irregularity for which the judgment against him may be reversed on appeal.

ID.—FORECLOSURE OF LIEN—PERSONAL JUDGMENT—SUPPORT BY PRAYER OF COMPLAINT.—In an action for the foreclosure of a mechanic's lien, the fact that the body of the complaint sought no personal judgment against the defendant is not fatal to such a judgment, where the prayer of the complaint demanded a judgment of this nature.

ID.—MOTION TO AMEND RETURN OF SUMMONS—GROUNDS NOT STATED—FAILURE TO OBJECT—APPEAL.—Where a motion to amend the return of summons fails to state the grounds upon which the motion was based, and no objection to the hearing of the motion is made on that ground, the objection cannot be made for the first time on appeal.

APPEALS from an order of the Superior Court of the City and County of San Francisco setting aside default from an order refusing an amendment to proof of service of summons, and from an order denying motion to set aside judgment. E. P. Mogan, Judge.

The facts are stated in the opinion of the court.

John T. Williams, and John D. Harloe, for Appellant and Respondent George W. McGinn.

Stafford & Stafford, for Respondent Mark Rees, and Appellant Mrs. Helen Rees.

THE COURT.—This is an action to foreclose a lien for street work. According to the caption of the complaint the action is against Helen Rees, John Doe Rees (her husband) and four fictitious defendants. Helen Rees, it is alleged in the complaint, is the owner of the property upon which the lien is claimed, and she alone entered into the contract with plaintiff for the performance of the street work. John Doe Rees is not alleged to be a fictitious defendant, but he and the four fictitious defendants, it is averred, claim some right or interest in the property, but which is subordinate to plaintiff's claim. In the prayer of the complaint judgment is demanded against the defendants for \$377.75 with interest and costs, and for a foreclosure of plaintiff's lien. Summons was served on Helen Rees and Mark Rees, and a judgment by default for the amount demanded was entered against said defendants and the requested decree granted. Within about three months after the entry of the judgment each of the

above-named defendants, specially appearing for that purpose, moved the court to set aside the judgment. Such motion was made, not under the provisions of section 473 of the Code of Civil Procedure, but upon the ground that the court was wholly without jurisdiction to enter the same. The plaintiff also upon due notice requested permission to amend the proof of service of summons on Mark Rees. The court refused to grant the motion to set aside the judgment against Helen Rees, and refused to permit the plaintiff to amend the return of summons, but granted the motion to vacate the judgment as to Mark Rees.

The plaintiff and defendants respectively prosecute appeals from these orders. These appeals are all embraced in one record, and will be considered together.

Several of the points made in their briefs by Helen and Mark Rees could be considered only upon an appeal from the judgment or upon a motion made under the terms of section 473 of the Code of Civil Procedure, and not upon the motions giving rise to these appeals, which simply test the question of the jurisdiction of the court.

The ground upon which Helen Rees relies for a reversal of the order denying her motion to vacate the judgment against her is that in effect she was not served with a copy of the complaint on file in the action as required by section 410 of the Code of Civil Procedure.

A copy of the complaint must be served with the summons. (*Southern Pac. R. R. Co. v. Superior Court*, 59 Cal. 471.) That case was approved in *State v. Harrington*, 31 Mont. 298, [78 Pac. 485], where the court held that when a summons was served without a copy of the complaint the court was without jurisdiction. In the present case there were a number of trivial differences between the complaint on file and the one served, the most important of which was the omission from the latter of one of the names of the defendants contained in the former, but as the summons served on Helen Rees with the copy of the complaint contained the omitted name we take the view that there was not such a failure to comply with the terms of section 410 as would result in a lack of jurisdiction in the court of the person of said defendant. If she had desired to test the sufficiency of the service she could have appeared and by an appropriate motion had that question settled at once. (*Arroyo Ditch etc. Co. v. Superior Court*, 92

Cal. 47, 52, [27 Am. St. Rep. 91, 28 Pac. 54].) We think she could not wait until judgment was taken against her, and then claim that it was a nullity because of minor differences between the complaint filed and the copy served upon her. (*Brum v. Ivins*, 154 Cal. 17, [129 Am. St. Rep. 137, 96 Pac. 876]; *Drake v. Duvenick*, 45 Cal. 455.) And even on a motion to set aside the service of summons, unless her substantial rights were affected—which does not appear to be the case here—such a motion would be denied. (*Fraser v. Oakdale L. & W. Co.*, 73 Cal. 187, [14 Pac. 829].)

As to the appeal by Mark Rees, it appears from the return that the summons with a copy of the complaint was served on this defendant, but that the name of Mark Rees did not appear in the complaint or summons. In this state of the record, without any amendment thereof, plaintiff took by default a decree of foreclosure and a judgment for \$377.75, with interest and costs, not only against Helen Rees, but also against Mark Rees. On the hearing of the motion made by Mark Rees to vacate the judgment against him he made no showing or claim that he was not served with summons, or that he was not the person intended to be sued by the name John Doe Rees. He depended—or in any event, according to the motion and the grounds thereof, was compelled to depend—on the point that from the face of the record it would not be presumed that John Doe Rees and Mark Rees were the same person, and, therefore, the action appearing to be against John Doe Rees, the court was without jurisdiction to render a judgment against Mark Rees.

If it appeared from the face of the record, as contended, that one person was served, and a judgment was obtained against a stranger to the action, although served with summons, it would no doubt be held that the court was without jurisdiction of the person so served, and that such judgment might be annulled at any time upon motion. But that is not this case, for here, although it is not so alleged, it would seem to appear from the name itself that John Doe Rees was a fictitious defendant, and this inference is strengthened by the fact that John Doe Rees in the complaint, and Mark Rees in the judgment, are referred to as the husband of the defendant Helen Rees. But however that may be, prior to the hearing of the motion to set aside the default of Mark Rees, the plaintiff had moved the court for permission to amend the re-

turn of proof of service of summons so as to make it show that Mark Rees was the person sued as John Doe Rees, and that Mark Rees was in fact served with summons. This proposed amendment was in conformity with the facts; it was in support of the judgment and in our opinion it ought to have been granted. (*Morrissey v. Gray*, 160 Cal. 390, [117 Pac. 438]; *Herman v. Santee*, 103 Cal. 519, [42 Am. St. Rep. 145, 37 Pac. 509].) With the return amended as proposed the record would then have shown that Mark Rees was the person referred to and intended to be described in the complaint by the name of John Doe Rees, in which event the judgment could not be regarded as void on its face, and consequently subject to be set aside at any time on motion.

Perhaps, as suggested, if the plaintiff desired to obtain judgment against Mark Rees, the complaint should have been amended by substituting his true name for that by which he had been sued; but failure in this respect amounted to no more than an irregularity, for which the judgment might have been reversed on appeal. (*McKinley v. Tuttle*, 42 Cal. 570; *Alameda County v. Crocker*, 125 Cal. 101, 104, [57 Pac. 766].) The court had jurisdiction of the subject matter, and when Mark Rees was served as a defendant sued by the name of John Doe Rees, which appears to be the fact, the court acquired jurisdiction of his person. (*Campbell v. Adams*, 50 Cal. 203; *Baldwin v. Morgan*, 50 Cal. 585.)

While it is true that in the body of the complaint no personal judgment was sought against Mark Rees, nevertheless the judgment, although of that nature, is not void, for the reason that the prayer of the complaint demanded a personal judgment against him for the amount of the contract price of the work performed together with the incidental costs. If there had been no such demand, the judgment here entered might be regarded as subject to the attack now made upon it, but there is a conflict of the authorities upon that question. (*Chase v. Christianson*, 41 Cal. 253; *George v. Noulan*, 38 Or. 541, [64 Pac. 1]; *Sache v. Wallace*, 101 Minn. 169, [118 Am. St. Rep. 612, 11 Ann. Cas. 348, 11 L. R. A. (N. S.) 807, and notes, 112 N. W. 386]; *Murdock v. De Vries*, 37 Cal. 527; *Brooks v. Forington*, 117 Cal. 219, [48 Pac. 1073].)

Plaintiff's motion to amend his return fails to state the grounds upon which it was based. It does not appear that the defendant objected to the hearing of the motion on that

ground, and apparently the objection is here made for the first time, for which reason we cannot entertain it.

For the foregoing reasons the judgment against defendant Helen Rees is affirmed, and the orders refusing plaintiff permission to amend his return of summons and opening the default of defendant Mark Rees are reversed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 21, 1917.

[Civ. No. 1964. First Appellate District.—March 22, 1917.]

A. F. GRACA, Appellant, v. FRANK RODRIGUES, Respondent.

SALE OF BUSINESS—AGREEMENT TO REFRAIN FROM CARRYING ON SIMILAR BUSINESS—ENFORCEMENT—RIGHTS OF SUCCESSIVE ASSIGNEES. Under a liberal construction of section 1674 of the Civil Code, which provides that one who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, the assignee of an assignee of a purchaser of the goodwill of a business is as much entitled to protection under such an agreement as his predecessors in interest, and may maintain an action to enjoin the vendor from violating the agreement.

Id.—GOODWILL OF BUSINESS—SALE AND TRANSFER.—Goodwill is an important and valuable incident to a business which the law recognizes and protects, and it may be sold with the business and assigned through successive transfers without limit.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Waste, Judge.

The facts are stated in the opinion of the court.

A. Q. Lomba, and W. W. Moreland, for Appellant.

Gonsalves & Keller, for Respondent.

KERRIGAN, J.—This is an appeal taken on the judgment roll from the judgment sustaining the defendant's demurrer

to plaintiff's amended complaint, the order sustaining the demurrer being made without leave to the plaintiff to amend.

The purpose of the action is to restrain the defendant from conducting a grocery business within a certain locality in the city of Oakland, contrary to an express covenant by him not to engage in a like business within that area. The complaint alleges that the defendant, the original owner of the business, agreed with his immediate covenantees, their executors, administrators, and assigns, not thereafter to open or conduct any other grocery store or grocery business within a certain specified limited area; that thereafter said covenantees sold and transferred the grocery store and the goodwill thereof to one Luz, and assigned and transferred to him the bill of sale and the covenant and agreement just referred to; that Luz on or about February 26, 1916, sold and delivered the said grocery business together with the goodwill thereof to the plaintiff, and assigned and transferred to the plaintiff said bill of sale and agreement of defendant.

It thus appears from the face of the complaint that the plaintiff is the assignee of an assignee of the original covenantee of the defendant; and for this reason the defendant asserts that the complaint fails to state or show a cause of action in the plaintiff. It is argued in support of the defendant's contention that the action is one to enforce a covenant which is void for the reason that it is in restraint of trade, and does not come within the exception to section 1673 of the Civil Code provided in the section following. Those two sections read respectively as follows:

"Sec. 1673. Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.

"Sec. 1674. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein."

It is argued that under the provisions of these sections the limit to which a covenant in restraint of trade can be carried is in favor of a person deriving title directly from the original purchaser. This position is sustained by the case of *Johnston v. Blanchard*, 16 Cal. App. 321, 328, [116 Pac. 973], in which

the court says: "While the appellant does not direct our attention to the fact or make any point thereon, reference to the judgment discloses that it is erroneous in this: that by its terms defendant is enjoined from engaging in or carrying on the business in the county of Los Angeles . . . so long as plaintiff, 'or his successors or assigns' continue in business." After quoting section 1674 of the Civil Code, the court, continuing, says: "Under the provision of this section of the code plaintiff, who derives his title to the business by transfer from W. W. Lee, who was the buyer from defendant, is entitled to have the contract enforced for his protection so long as he carries on a like business in the county, but such rights cannot be extended to his successors or assigns. It therefore follows that the judgment in so far as it refers to the successors or assigns of plaintiff is unwarranted, and to that extent erroneous."

With diffidence and reluctance we disagree with this view of the law. Goodwill is an important and valuable incident to a business which the law recognizes and protects. With a business it may be sold or mortgaged, and is property transferable like other property. (Civ. Code, sec. 993.) A covenant or obligation entered into with a buyer to refrain from engaging in a like business within specified territorial limits is assignable. (*California Steam Nav. Co. v. Wright*, 6 Cal. 258, [65 Am. Dec. 511].) Such contract and goodwill are valid when held by the assignee of a purchaser even if no reference is made therein to the successors and assigns of the purchaser. (12 R. C. L. 991.) In *Swanson v. Kirby*, 98 Ga. 586, [26 S. E. 71], it appeared that the defendant had sold out his business as a ticket broker to the plaintiff, and had contracted not to open another ticket business in the city of Atlanta without his consent. The purchaser transferred the contract to a third party, who sold the business to another, and the latter entered into partnership with the plaintiff, the original purchaser from the defendant. This partnership was later dissolved and the plaintiff continued in the business alone. It was held that the benefit of the contract not to engage in the ticket business without the consent of the plaintiff passed to the purchaser with each transfer of the business. An examination of the authorities discloses that the law generally provides that the goodwill of a business may be sold with the business and assigned through successive transfers

without limit. We do not believe that the legislature of this state, when enacting section 1674, intended to adopt a different rule. We can conceive of no good reason why it should have done so, or why the assignee of an assignee of a purchaser of the goodwill of a business is not as much entitled to protection as any of his predecessors in interest. We think under a reasonable construction of this section that he is so entitled. It is often said that contracts in restraint of trade should be strictly construed; that they are against public policy, and therefore presumably bad; and that their provisions should not be extended by construction or implication so as to favor persons desiring to enforce them beyond what their terms would clearly require. Perhaps the modern rule is that such contracts should be construed without any adverse bias. (24 Am. & Eng. Ency. of Law, 857; *Herriman v. Menzies*, 115 Cal. 16, [56 Am. St. Rep. 82, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730].) However that may be, under the contract here in question the defendant, as vendor, did intend to bind himself in favor of his immediate purchaser and the latter's successive transferees; and the only question that we are called upon to consider is whether the parties to the contract under the sections above quoted have the power to so contract. Construing the sections liberally, as required by the code of this state, we think the benefit of the covenant of the contract not to engage in the grocery business within the designated limited area passed to the purchasers with each transfer of the business.

The judgment is reversed, with directions to the trial court to overrule the demurrer and permit the defendant to answer.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 21, 1917, and the following opinion then rendered thereon:

THE COURT.—The application for a hearing in this court after decision by the district court of appeal of the first appellate district is denied.

The opinion is in conflict with what was said by the district court of appeal of the second appellate district as to the

proper construction of section 1674 of the Civil Code in *Johnston v. Blanchard*, 16 Cal. App., at page 328, [116 Pac. 973], as is shown by the opinion in this case. We are satisfied that the opinion in this case correctly states the law on the point discussed, and that what was said thereon in *Johnston v. Blanchard, supra*, must be disapproved.

[Civ. No. 1907. First Appellate District.—March 22, 1917.]

EDWARD L. SOULE, Respondent, v. NORTHERN CONSTRUCTION COMPANY (a Corporation), Appellant; ALBERT ABRAMS et al., Respondents.

BUILDING CONTRACT—INSTALLATION OF REINFORCING STEEL—REQUIREMENTS OF SUBCONTRACTOR.—Where a contract for the construction of a garage requires the contractor to construct a concrete building, to be reinforced by steel bars, fabric stirrups, and tying wire, and the specifications provide that bars will be used in all footings, beams, girders, walls, but in no floor or roof slabs, a subcontractor who takes over the contract for the general installation of the reinforcing steel for the building, is required to install reinforced steel bars or fabric in the floor and roof slabs entering into the construction of the building, where his contract requires him "to furnish and set in place in a workmanlike manner all reinforcing steel bars, tying wire, etc., required to be used in the construction of that certain building to be erected on the lands hereinafter described in accordance with the plans and specifications for the construction of said building"; as the expression "etc." means "other reinforcing material," which includes fabric.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. **Bernard J. Flood, Judge.**

The facts are stated in the opinion of the court.

N. A. Dorn, for Appellant.

Jordan & Brann, for Respondent Edward L. Soule.

Henry Ach, for Respondent Albert Abrams.

Cushing & Cushing, for Respondent First Federal Trust Co.

KERRIGAN, J.—This is an action to foreclose a mechanic's lien. From the judgment given and entered against it the defendant Northern Construction Company has appealed.

The sole point in the case is whether or not, under a fair construction of a contract entered into between the plaintiff and said company the former was required to install reinforced steel bars or fabric in the floor and roof slabs entering into the construction of a certain building. From the record it appears that the Northern Construction Company on the twenty-first day of April, 1913, entered into a written contract with Albert Abrams for the construction of a garage upon a lot in San Francisco. Under the terms of this contract the company was required to construct a concrete building, to be reinforced by steel bars, fabric stirrups, and tying wire. In the specifications, which were a part of the contract, there was a general provision reading: "Bars will be used in all footings, beams, girders, walls, but in *no floor or roof slabs.*" Following upon the execution of this contract the company entered into a contract with plaintiff, who was a dealer in and a contractor for the installation of reinforcing steel, by the terms of which plaintiff agreed "to furnish and set in place in a workmanlike manner all reinforcing steel bars, tying wire, etc., required to be used in the construction of that certain building to be erected on the lands hereinafter described in accordance with the plans and specifications for the construction of said building." It is the contention of the plaintiff that under the terms of this contract he was not required to furnish and set in place reinforcing steel for the floors and roof of the building.

Before discussing this point it may not be amiss to say that a slab in concrete construction is that portion of the structure underneath and supporting the floor and extending between the beams and girders. The beams support the slabs, while the girders are what are commonly termed the long supports which run a few feet apart longitudinally through the interior of the building, and which are generally supported by the columns. Reinforcing steel bars are small sections of steel made into straight or twisted bars, which are embedded in the concrete to take up the tensional and shearing strains which are due to the longitudinal load of the structure where such strains are encountered. Tying wire is No. 16 black fencing wire, and is used to fasten the steel together. Fabric

consists of a union of drawn wires made up in rows. In passing it may also be stated that no personal judgment is sought against Albert Abrams or against the First Federal Trust Company. They are merely formal parties defendant to the action.

Under one provision of the specifications no bars are to be used in the slab reinforcement of the floors and roof, while under another provision it is optional with the contractor as to whether or not in the slab reinforcement of the floors and roof bars or fabric shall be used. There is a conflict between those two provisions of the specifications; but the provision stating that no bars shall be used in the floor and roof reinforcement is general in its character, while the other provision refers specially to floors and roof, and perhaps that provision therefor should control as to the nature of the work to be done on that part of the building. We have no doubt, however, but that under these two provisions the original contractor was required to furnish and set in place either bars or fabric for the floor and roof reinforcement; and this, of course, is required of the subcontractor unless, as asserted by him, the expression "etc." found in his contract is without force, and means nothing.

He took over the contract for the general installation of the reinforcing steel for the building; and when he did so it was doubtless expected that all work of that character would be done by him; and we think this contract when fairly construed so provides. The contract requires him to furnish and set in place all the reinforcing bars, tying wire, "etc.," according to the plans and specifications for the building. The words *et cetera*, abbreviated to the form etc., are said by Webster to be equivalent to the phrase "others of like kind; and the rest; and so on." In the case of *Gray v. Central R. R. Co.*, 11 Hun (N. Y.), 70, 75, it was held that the term "etc." as used in a contract for the sale of a boat, where the parties agreed to take the boat "provided upon trial they were satisfied with the soundness of her machinery, boilers, etc.," meant "other things" referring to other material parts of the boat. The expression "etc." as used in the contract before us certainly must have been used for some purpose; and we think it means "other reinforcing material," which, of course, would include fabric. There is nothing in the case which would warrant us in holding the term to be meaningless. In

our opinion its effect, taken in connection with the provision of the specifications above quoted, was to require the contractor to furnish and install bars or fabric in the slab reinforcement of the floor and roof. We think the trial court was in error in exempting the plaintiff from this obligation, and that the judgment should be reversed. It is so ordered.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 21, 1917.

[Civ. No. 1626. Third Appellate District.—March 22, 1917.]

EDWARD B. TAUGHER, Respondent, v. RICHMOND DREDGING COMPANY (a Corporation), et al., Appellants.

ACTION AGAINST CORPORATION AND STOCKHOLDER—LEGAL SERVICES—SEPARATE JUDGMENTS—LACK OF PREJUDICE.—In an action for legal services brought against a corporation and a stockholder who owned all of the stock but two shares, the defendants are not prejudiced by the entry of a judgment in a fixed sum against each, since a payment of the judgment by the corporation would discharge the liability of the stockholder, and the payment by the stockholder of the amount adjudged payable by him would discharge the corporation *pro tanto*.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. W. M. Conley, Judge presiding.

The facts are stated in the opinion of the court.

W. H. H. Hart, and Frank W. Hooper, for Appellants.

J. L. Taugh, for Respondent.

CHIPMAN, P. J.—The action is by the assignee of the claim of J. L. Taugh for legal and professional services as

attorney at law alleged to have been rendered and performed at the special instance and request of defendant Richmond Dredging Company, at divers times between May 1, 1910, and March 8, 1912, both dates inclusive, which said services were of the alleged value of \$13,180, no part of which has been paid. Cutting was made a party defendant as a stockholder in said Dredging Company. The complaint specifies five different matters in which said attorney performed services of considerable consequence to the Dredging Company. One of these matters related to services rendered in commencing and conducting an action in the superior court of Contra Costa County wherein said Dredging Company was plaintiff and the Santa Fe Railroad Company the defendant, in which plaintiff recovered judgment for \$25,925. Another was for services in connection with the recovery of the possession of the dredger "Richmond No. 1" prior to the filing of a libel in the United States district court, in admiralty, and also for services in said admiralty court in connection with said libel. Other services are alleged to have been rendered for said Dredging Company in and about two certain actions commenced in the superior court of the city and county of San Francisco by the Richmond Light & Power Corporation against said Dredging Company. Also for services in connection with a certain contract wherein the Santa Fe Railroad Company was party of the first part, the said Dredging Company party of the second part, and the East Shore & Suburban Railway Company party of the third part.

It is alleged that the capital stock of said Dredging Company was two hundred thousand dollars, divided into two thousand shares, each of the par value of one hundred dollars, and that all of said shares were subscribed, of which said stock said Cutting was, at all times mentioned in the complaint, the owner of 1,998 shares in his own right. The pleadings are verified.

In their answer the defendants made certain admissions, but denied in substance that said attorney performed the services alleged to have been performed by him, and denied any indebtedness to him or to plaintiff on account of any said alleged services; denied, on information and belief, that J. L. Taugher "ever was, or now is, a duly, or otherwise qualified, or licensed attorney, or counselor at law, or licensed, or practicing as such, or entitled to practice at any time as such";

denied that the subscribed capital stock of said company was or now is greater in number than thirty-eight shares and alleges that Cutting "was the subscriber of one share and no more."

It is alleged as further answer in substance that Cutting engaged attorney Taugher (plaintiff's assignor) "to help him, the said Cutting, with the cases and legal affairs of him, said Cutting, and the various corporations in which he, the said Cutting, was interested," including the corporation defendant herein, and that said Taugher agreed "to do all of said Cutting's legal work and the legal work of said corporations in which said Cutting was interested, for and in consideration of said two hundred dollars per month, with the express understanding that nothing further whatever would be charged or paid except such further sums as would be satisfactory to said Taugher in the event that he (said J. L. Taugher) should succeed in winning said cases satisfactorily to said Cutting," and that said Taugher "promised to see the whole work through and get nothing over two hundred dollars per month until the work was finally finished and the money collected, and then only such further sum as would be satisfactory to said Cutting." It is further alleged "that no moneys as yet have been collected from any of the judgments, and said J. L. Taugher has not completed his said service and has not complied with or performed the terms of said contract," wherefore said Taugher is not entitled to any further compensation; that defendants have and each of them has complied with every condition of said contract on their part to be performed and that, before the assignment made to plaintiff, said J. L. Taugher "had been fully paid for all work that he had performed in the premises and for all the work mentioned and described in plaintiff's complaint herein"; that said J. L. Taugher "refused to perform further services for said defendants, or either of them, in said business, and that by reason thereof said defendants, and each of them, were not satisfied with said J. L. Taugher's services in the premises."

The court found as facts: (Finding 1) That J. L. Taugher was a duly qualified and licensed attorney practicing as such under the laws of this state; (Finding 2) that Richmond Dredging Company was at all times mentioned a duly organized corporation under the laws of California; (Findings 3, 4,

5) that the capital stock of said company is as alleged in the complaint and was all duly issued, "and at all and every of the times mentioned in plaintiff's complaint, H. C. Cutting was and now is the owner in his own right of 99.9 per centum of the whole capital stock of said company, and of the subscribed stock thereof and was the owner of 1998 of said shares." None of the foregoing findings is now challenged, although in their verified answer defendants denied that said J. L. Taugher was an attorney at law; denied that more than thirty-eight shares of the capital stock of said company had been issued and alleged that Cutting "was the owner of one share and no more." Findings 6 to 12, both inclusive, are challenged as not supported by the evidence. They may be summarized as follows: That J. L. Taugher performed services for the Dredging Company as alleged in the complaint, of the reasonable value of \$4,650, no part of which has been paid, and that plaintiff is the owner of said claim by assignment to him prior to the commencement of the action; (Findings 6, 7, 8) that there is now due and owing to plaintiff for said services, from said Dredging Company, the sum of \$4,650, and from said Cutting the sum of \$4,645.33; (Findings 9, 10, 11.) Finding 12 is as follows: "That all the allegations of the answer of defendants are untrue, except the express admissions contained therein."

As conclusions of law the court found that plaintiff was entitled to recover from defendant Dredging Company the sum of \$4,650 and costs of suit and from defendant Cutting the sum of \$4,645.33 and 99.99 per centum of the costs. Judgment passed accordingly. Defendants appeal from the judgment and the order denying their motion for a new trial.

There is abundant evidence that plaintiff's assignor performed services as attorney practically as averred in the complaint, and there was ample evidence to support the findings as to the value of said services. The evidence would have justified a larger judgment. The evidence was that much important successful litigation was conducted by attorney Taugher for defendant Dredging Company, occupying substantially all his time for nearly two years.

The only questions as to which there was any serious controversy were, first, were the services rendered by attorney Taugher performed for the Richmond Dredging Company at its instance and request? Second, were these services per-

formed under the contract alleged in the answer which, in effect, was alleged to have been that Mr. Taugher "would do all of said Cutting's legal work and the legal work of the corporations in which said Cutting was interested, for and in consideration of said two hundred dollars per month," and when the work was finished, "only such further sum as would be satisfactory to said Cutting?" Third, did Mr. Taugher fail to perform the terms of said contract? Fourth, has he been fully paid?

It appeared that Mr. Cutting was president of the Richmond Dredging Company and also president of the Point Richmond Canal & Land Company, and owned substantially all of the shares of these corporations. In the course of his testimony concerning the alleged contract he claimed to have made with Mr. Taugher, Mr. Cutting testified: "Q. Did you at that time explain to him with reference to the different corporations that you had? A. Oh, yes. He thoroughly understood that. Q. Tell what you said to him on that subject. A. I told him all about it; I told him the whole lay-out. That the Point Richmond Land & Canal Company and the Richmond Dredging Company were practically myself; the same thing; and I explained to him the business and the construction of the whole thing. We went clear through it with long explanations." He testified that he had a great deal of private business outside of these corporations.

It appeared that Mr. Taugher performed services for the Richmond Land & Canal Company, and also for Mr. Cutting individually, and there was evidence that payments were made by Cutting and by the Point Richmond Canal & Land Company to Mr. Taugher, as shown by checks and receipts, amounting to \$3,669.50. Defendants claim that this amount should have been deducted from the amount found by the court to be due for said services, to wit, \$4,650. Mr. Taugher contended, and so testified, that these payments were made by Cutting and the Richmond Canal & Land Company for services rendered by him to them, and that he had applied the payments on account of such services, and that there remained an unpaid balance due him from Cutting and said corporation. None of these payments appeared to have been made by the Richmond Dredging Company or on account of services for that company. As to the alleged contract that attorney Taugher was to receive only two hundred dollars

per month, and such further compensation as Cutting might feel disposed to allow, the testimony of Cutting and Taugher was in sharp conflict, the latter testifying that no such contract was made. The finding of the court that defendants' claim in this respect is untrue is, under the rule, conclusive upon us. As the court found that the contract alleged by defendants was not entered into, it would follow that there was no breach of such contract by attorney Taugher.

There was no formal employment of attorney Taugher evidenced by a resolution of the directors of the Dredging Company. His employment was by Cutting on its behalf and it received the benefit of the services rendered. Cutting was for all practical purposes the corporation, and was managing its business much the same as if it were his own. We do not think the corporation can escape liability on the theory that Cutting was unauthorized to incur it. The finding of the court that the services of attorney Taugher were performed at the instance and request of the defendant company, and not under the contract alleged by defendants, finds support in the evidence.

This action was commenced March 9, 1912. After the judgment had been recovered against the Santa Fe Railroad Company in favor of the Richmond Dredging Company, and some time prior to the commencement of the present action, a disagreement arose between attorney Taugher and Cutting as to the compensation due to the former for his services, who at the time was urging further payment on account. Some of the matters in the attorney's charge had been finally disposed of, while others were yet unfinished, and an appeal by the Santa Fe Company in the dredger case was impending. It is not necessary to burden this opinion with the testimony bearing upon the merits of this dispute. It arose mainly out of Cutting's contention that Taugher was working under a contract for two hundred dollars per month, which the court found was not true. Much bitterness of feeling between the two men was engendered which resulted in the substitution by Cutting, with Taugher's consent, of another attorney to conduct the Richmond Dredger Company case for respondent on the appeal and the severing of all relations as client and attorney, followed by the present action.

We think the evidence abundantly showed that Taugher had not been paid in full for his services as is now contended

by appellant and treating the payments made, as probably the court did, as justly applicable, as far as they went toward compensating the attorney, his services were shown to be reasonably worth an additional amount quite equal to that found by the court.

Nor do we think the evidence showed that there was an agreement on Taugher's part, as is claimed, "to prosecute each of the cases mentioned in plaintiff's complaint, to a finality, which he did not do." No doubt he expected to be retained in the business to a finish, but the evidence would not have justified the court in finding that his compensation depended upon such a condition. Besides, he did not voluntarily throw up his brief, but was relieved from further responsibility in the business by Cutting himself. His action was for services rendered up to the date of his discharge which was early in March, 1912. The evidence was directed to the value of his services rendered, and the witnesses based their estimate of such value upon the successful manner in which he had conducted the business prior to his discharge.

It is claimed that the court erred in entering judgment against the Dredger Company for \$4,650 and costs of suit, \$56.25, and a separate judgment against defendant Cutting for \$4,645.33 and \$56.19 costs. There is in fact but one judgment, but inasmuch as Cutting's liability was that only of a stockholder, the amount of the judgment chargeable to him was necessarily less than that against the Dredging Company because he did not own all of its capital stock. A payment of the judgment by the Dredging Company would discharge his liability under it, and the payment by him of the amount adjudged payable by him would discharge the Dredging Company *pro tanto*. We do not see how either appellant is prejudiced by the form of the judgment.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 21, 1917.

[Civ. No. 2034. First Appellate District.—March 26, 1917.]

MERCEDES L. CALL et al., Respondents, v. JENNER LUMBER COMPANY (a Corporation), Appellant.

CONTRACT—SALE OF STANDING TIMBER—TIME FOR REMOVAL.—Under a contract for the sale of growing timber which provided that the cutting and removal should be completed within five years from the commencement thereof, and in no event later than July 1, 1915, at which time the premises were to be surrendered to the owner, the purchaser, where operations were begun and suspended, had not the right to resume operations after the expiration of five years from the time of such suspension, although such attempted resumption was prior to July 1, 1915.

ID.—TIME FOR REMOVAL OF TIMBER—PROVISION IN CONTRACT—CONDITION OF SALE.—A provision in a contract for the cutting of standing timber that the cutting should be completed within five years, and in no event to be carried on beyond a given date, is a condition of the sale, and not a covenant to remove the timber, and the purchaser can only take so much of the timber as he may cut and remove within the specified time.

APPEAL from a judgment of the Superior Court of Sonoma County. Emmet Seawell, Judge.

The facts are stated in the opinion of the court.

J. R. Leppo, for Appellant.

Geary & Geary, for Respondents.

KERRIGAN, J.—Action to enjoin the defendant from entering upon certain lands of the plaintiffs and cutting and removing the redwood and pine timber thereon. The judgment went for the plaintiffs as prayed, and defendant appeals.

The predecessor of the plaintiffs on June 15, 1906, entered into a contract with the Western Redwood Lumber Company, the assignor of the defendant, by which it granted and conveyed to said Lumber Company the redwood and pine timber upon a tract of land known as Mayer's ranch or tract. Said contract was entered into pursuant to an option previously given fixing the price to be paid, and providing that the timber should be removed by July 1, 1915. Among the

provisions of the contract by which the timber was conveyed to the Lumber Company were the following:

"It is further mutually agreed and made an express condition hereof that said party of the second part is to and will fully complete the cutting and removal of the said pine and redwood timber and trees hereby conveyed to it within the period of five years from the time when it shall commence to cut the same, but in no event later than the 1st day of July, 1915; that when it shall commence to cut and remove the said timber and trees it shall thereafter proceed with the cutting and removal thereof with due diligence and dispatch; and that as soon as it shall stop the cutting and removal thereof it is to and will surrender, turn over and deliver to said parties of the first part the full, actual and exclusive possession of the said Mayer Tract, and of every part and parcel thereof, to be by them thereafter held, possessed, used and enjoyed as of their first and former estate therein. . . .

"It is further mutually agreed and made an express condition hereof that all of the timber and trees purchased by or hereby granted and conveyed to said party of the second part are to and shall be cut and removed from the said Mayer Tract before the said 1st day of July, 1915, and that upon the expiration of the period ending on said last-named day, and by reason of the expiration thereof, this conveyance and all rights of the said party of the second part hereunder, if not previously determined, shall forthwith and wholly cease, determine, lapse and become void, and that it shall not have any right whatever at any time after said last-named day to enter upon the said Mayer Tract, or any part of the same, or to cut or to remove any of the timber, trees or wood growing or standing or lying or being thereon; also that any and all timber, trees, wood, logs or other products of the said land, or of the trees or timber thereon, which shall on said last-named day, or on the sooner determination of the rights of the said party of the second part hereunder, remain or be upon the said tract, shall belong absolutely and exclusively to said parties of the first part."

In the month of August, 1907, the Western Redwood Lumber Company proceeded to cut and remove the timber, and in a period of three months had cut and removed about one-half of the standing timber, at which time it became insolvent and ceased operations. Some three years thereafter the

defendant succeeded to the rights, if any at that time existed, under its said grant and contract, but did nothing toward resuming operations until some time during January, 1914, some six and one-half years after the Western Redwood Lumber Company had commenced the removal of the timber, and over six years after its cessation of operations, at which time it began to make preparations therefor. Immediately there-upon, to wit, on February 5, 1914, the plaintiffs served written notice upon the defendant not to enter upon the said tract of land or to cut or remove timber therefrom, and notifying it that the rights to the timber formerly owned by the Western Redwood Lumber Company had been terminated and had reverted to said plaintiffs. The plaintiffs through their predecessor and tenants were at all times, including the brief period of operation by the Lumber Company, in possession of the land involved in the action, using the same in connection with an adjoining tract for dairying purposes. After the shutting down of operations by the Lumber Company no attempt was made to preserve the railroad and other improvements upon the premises constructed by it to facilitate its work; the railroad was partly destroyed by slides and washouts; the cabins and cookhouse remained unoccupied; the wire rope and machinery were left out in the woods to rust. The doors and windows of the cabins were at all times left open, and the stove in the cooking-house fell to pieces. After the abandonment of the work of cutting and removing the timber, and until early in the year 1914, an employee of the Lumber Company or its successor, designated as a "care-taker," visited the Mayer Tract about once a month; but such visits were unknown to the plaintiffs, and resulted at no time in any effort or steps taken to preserve the improvements or personal property left by the Lumber Company at the scene of its former operations. The land both before and after the execution of the contracts upon which the defendant's rights are founded was at all times assessed to the plaintiffs and their predecessors, who paid all taxes thereon, and at no time was any interest therein assessed to the defendant or its assignor.

Upon evidence establishing the foregoing state of facts the court found that on October 30, 1907, the Western Redwood Lumber Company and all of its agents and employees entirely withdrew from the land; and that neither they nor the

defendant has thereafter ever been in possession thereof or exercised acts of ownership with regard thereto, but that the plaintiffs, ever since said thirtieth day of October, 1907, have been in possession of the lands and of all the standing and growing timber thereon; and as a conclusion of law found that the defendant has no interest in the pine or redwood timber growing upon said tract.

In support of the appeal it is the principal contention of the appellant that under the contract in suit, construed in connection with the option which preceded it, no forfeiture of the right to cut and remove the timber could occur before July 1, 1915. With this contention we cannot agree. We are of the opinion that the rights granted to the assignor of the defendant are to be found in the contract of June 15, 1906, entered into upon the exercise by said assignor of the option previously given to it, and that the plain meaning of the provisions of that contract above quoted is that the right of the grantee thereunder to cut timber should expire *ipso facto* at the end of five years from the commencement of the cutting, and in any event should expire on July 1, 1915, so that if the grantee delayed the commencement of its operations until a point of time less than five years prior to said last-mentioned date the five-year period would be thereby correspondingly curtailed. It is not necessary in sustaining this judgment to go so far as to hold that the grantee's rights were forfeited by its discontinuance of operations on October 30, 1907. It is sustainable upon the theory that those rights continued in force five years from the commencement of the removal of the timber, which would be in August, 1912. As we have seen, it was nearly two years later than this date that the defendant prepared to re-enter the lands for the purpose of resuming operations. It has been frequently and expressly held that a sale of standing timber, the same to be removed within a specified time, is a grant of only so much thereof as shall be removed within that period.

The rule applicable to contracts such as the one in suit is stated in 25 Cyc. 1551: "It is customary where standing timber is sold without the land, to provide in the contract that the timber shall be removed within a specified time. Where such clause is inserted the time usually begins to run from the execution of the conveyance, although sometimes a different time is agreed upon, such as the time of the commencing of the

cutting. The general rule is that where the contract requires the timber to be removed within a given time the sale is only of so much timber as is removed within that time, and confers no authority to remove after the expiration of the time specified. The majority of cases hold that the title to the timber not removed reverts to the owner, but some of the cases merely hold that the buyer has no right of entry. Each case depends upon the terms of the particular contract."

In the case of *King v. Merriman*, 38 Minn. 47, [35 N. W. 570], an action for damages for the conversion of a quantity of sawlogs, the court used this language: "Contracts relating to an interest in standing timber with an express limitation as to the time of removal are familiar to the American courts in the timber states. Sometimes these contracts are in the form of conveyances of timber; sometimes of a sale coupled with a license to enter; sometimes of a formal license to enter and cut, and again of a reservation of the timber by the grantor in the conveyance of the land. But whatever the form, the limitation as to the time of removal has been almost invariably held to be a limitation of the grant or reservation itself. The reasons are manifest. Any other construction would be against the expressed intentions of the parties. Moreover if the right of entry be not limited to the time fixed, it would be practically unlimited, which would amount to so serious an encumbrance upon the land as to materially interfere with the owner's right to use or dispose of it."

In *Utley v. S. N. Wilcox Lumber Co.*, 59 Mich. 263, [26 N. W. 488], the supreme court of Michigan says: "The legal effect of the contract was that Wilcox, the owner of the land, sold to Utley the pine timber thereon for \$2,500, Utley to cut and remove the same therefrom during the winter of 1877 and 1878, or if it could not be done for lack of snow then he was to cut and remove the same during the winter of 1878 and complete the job by May 1, 1879. The title to the timber passed to Utley immediately upon the execution of the contract. The license to remove the timber continued until May 1, 1879. The express agreement of Utley was that he would commence at once on the job and finish by May 1, 1879. The intention is clearly expressed to limit the time in which he might cut and remove the sawlogs. From all the acts and contracts of the parties in connection therewith the intention clearly appears to limit the time in which the timber should

be cut and removed, and that the sale was confined to such timber as should be cut and removed within the specified time."

In *Null v. Elliott*, 52 W. Va. 229, [43 S. E. 173], the owner of the land granted, bargained, and sold all the timber, tan-bark, and ties on the premises. The contract provided that the grantee was to have two years from date to take off and remove said timber and not later, and to have all the privileges of going on said land with roadways, mill sites, etc. The time limit in the contract expired, and the grantor notified the grantee not to further trespass upon the land by cutting any more timber, or removing that already cut, or the temporary buildings erected by the grantee upon the land. The grantee filed his bill, setting out the hardships of the contract, the great loss he would sustain if he was prevented from reaping the benefits thereof, and asking the court to relieve him by extending the time for the execution of the contract. The court in deciding the case says: "A contract for the sale of all the timber, tan-bark and ties on a certain tract of land, and providing that the purchaser is to have two years to take off and remove such timber, and not later, does not authorize the purchaser to sever any timber standing on the land after the two-year limit has expired. Such a provision as this in timber contracts is held to be a condition of the sale, and not a covenant to remove, and the purchaser only takes so much of the timber as he may cut and remove in the specified time; otherwise it remains the property of the land owner as part of the land. Such being the law the plaintiff could not ask a court of equity to extend the time limit, for it would be making a new and entirely different contract between the parties."

The appellant further contends that the provision in the contract that the removal of the timber should be completed within five years from the time of its commencement, is a mere covenant on the part of the grantee such as is alluded to in the case from which we have just quoted, the breach of which entails no forfeiture; and cites the case of *Peterson v. Gibbs*, 147 Cal. 6, [109 Am. St. Rep. 107, 81 Pac. 121]. The facts of that case, however, were different from those here. The contract gave to the grantees ten years within which to remove the timber, followed by a provision that for every year thereafter that the timber was allowed to remain on the land

the grantees should pay the sum of two hundred dollars. The court held that in such a case the removal within ten years was not a condition attached to the grant of the timber, but it also laid down the rule that "the question in each case is as to what is the contract between the parties."

The next contention of the appellant is that if the right of forfeiture existed before July 1, 1915, it was not self-executing, but upon the happening of the default it was necessary for the plaintiffs by some overt act to assert their right of forfeiture, and that if they failed to do so, or thereafter recognized the defendant's interest as continuing, no forfeiture accrued.

We think that this contention is sufficiently answered by the finding of the trial court that the plaintiffs at all times were in possession of the land after the withdrawal by the defendant's assignor, and by what we have already said as to the five-year limitation upon the right to cut timber upon the plaintiff's land.

The adverse findings of the trial court also dispose of the further contention that the plaintiffs expressly, impliedly, and by laches waived any right of forfeiture that existed in their favor, and were estopped by their conduct to claim any termination of defendant's rights prior to July 1, 1915.

The further claim is made by the appellant that any limitation of time for the cutting of timber was superseded by express agreement; but the evidence upon which this contention is based, viz., an expression in a letter written by one of the plaintiffs to the defendant, was not considered by the trial court as susceptible of receiving this construction, and we think the trial court was entirely correct in its conclusion.

It is finally urged in support of the appeal that the court's finding "That prior to the service of said notice (of February 5, 1914) plaintiffs did no other act to indicate a claim of forfeiture," entitled defendant to judgment; but we think it sufficiently apparent from what we have already stated that under the facts of this case it was not necessary for the plaintiffs to do more than they did to permit them to exclude defendant from their lands from and after the month of August, 1912; and the only occasion or necessity for serving the defendant with the written notice of February 5, 1914, alluded to in the finding of the trial court in question, arose from the

asserted intention of the defendant at that time to resume lumbering operations upon the plaintiffs' land.

For the foregoing reasons the judgment is affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 24, 1917.

[Civ. No. 2231. Second Appellate District.—March 26, 1917.]

JOHN LAPIQUE, Appellant, v. EUGENE R. PLUMMER et al., Defendants; CATHERINE AGOURE, Respondent.

APPEAL—TYPEWRITTEN TRANSCRIPT—WHEN UNAUTHORIZED.—There is no authority, either in the rules of court or in the statutory provisions, for a transcript presented by a certified typewritten copy where the appeal is from the judgment upon the judgment-roll alone. Sections 953a, 953b, and 953c of the Code of Civil Procedure, as they were in August, 1914, when the transcript herein was filed, did not apply on such an appeal.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge.

The facts are stated in the opinion of the court.

John Lapique, *in pro. per.*, for Appellant.

O'Melveny, Stevens & Millikin, and Stuart O'Melveny, for Respondent.

THE COURT.—This is an appeal upon the judgment-roll from a judgment of dismissal of the action as to respondent Catherine Agoure as administratrix of the estate of Pierre Agoure, deceased, entered upon an order of court sustaining her demurrer to the second amended complaint, without leave to amend.

As stated, the appeal is upon the judgment-roll *alone*, a transcript of which is presented by a certified typewritten copy. No authority is found, either in the rules of the court or in the statutory provisions of the code, for this method of bringing up the record, where it consists solely and alone of the judgment-roll. In the cases there specified, sections 953a, 953b and 953c of the Code of Civil Procedure provide for the preparation, certification, and filing of phonographic reports and transcripts of records to be used on appeal; but these sections do not apply to the transcript where the appeal is from the judgment upon the judgment-roll alone. "The provision that the transcript need not be printed applies only where the appellant has availed himself of section 953a, and the latter section relates and applies only to cases where a reporter's transcript is prepared and settled." (*Harpold v. Slocum*, 168 Cal. 364, [143 Pac. 609].) Hence, it follows that in cases where there is no substitute for the bill or reporter's transcript prepared under section 953a, there is no statutory exemption from the necessity of printing the transcript, as required by rule VII of the supreme court [160 Cal. xlvi, 119 Pac. xi] on the subject, which must prevail. For this reason, the appellant is not entitled to a hearing of the appeal, which should be and it is dismissed.

Our opinion is based upon the sections of the code as they were in August, 1914, when the transcript herein was filed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 24, 1917.

[Crim. No. 532. Second Appellate District.—March 27, 1917.]

THE PEOPLE, Respondent, *v.* A. KUHN, Appellant.

CRIMINAL LAW—FORGERY—FRAUDULENT INTENT—QUESTION FOR JURY.—

In a prosecution for the forgery of a check, the fraudulent intent of the defendant is a question to be determined by the jury.

ID.—SUFFERING OF ACTUAL DAMAGE—NONESSENTIAL ELEMENT.—In such a prosecution it is not necessary to sustain a conviction that the party whose name had been forged had suffered actual damage; it is only essential that it appear that if the manifest intent of the defendant culminated in success, such damage or detriment would follow.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order denying a new trial.
J. W. Curtis, Judge.

The facts are stated in the opinion of the court.

Albert D. Trujillo, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

JAMES, J.—Defendant was convicted of the crime of forgery and sentenced to a term of imprisonment. He appeals from the judgment and from an order denying his motion for a new trial.

It was charged by the information that the defendant forged the name of G. W. Dewey to a check for the sum of \$25, drawn on the Farmers Exchange National Bank of San Bernardino. The defendant did not deny having drawn the check, and did not deny having signed the name of Dewey thereto. He claimed in his defense to have obtained some authority authorizing him so to do, although he did not assert that this authority expressly authorized him to draw checks, but rather that he was authorized to do business for Dewey. In the city of San Bernardino Dewey owned a furniture business which was conducted by an agent named Liphard. Dewey lived in the city of Los Angeles. Liphard had full control of the business in San Bernardino, including the making of deposits of money in bank, and drawing checks

thereon. Such checks were drawn in the name of Dewey with the initials of Liphard following the signature. The defendant had made some collections and attended to the sales of some merchandise on behalf of the Dewey store in San Bernardino. The manager, however, testified that no authority had at any time been given to defendant, either by himself or by Dewey, to draw checks. The check described in the information was cashed by the defendant at a saloon in Colton. Defendant testified that of the \$25 which he received he paid to Liphard, manager of the store of Dewey, \$10, and retained the remaining \$15 for the purpose of paying his expenses on a trip to the city of Los Angeles, where he claimed to have had some business to do with Dewey himself. Liphard denied having received the \$10 mentioned by the defendant. The check upon being presented to the bank for payment was declared to be a forgery and the arrest of defendant followed in consequence. Upon this state of the evidence the defendant here contends on his appeal that there was no showing made of any intent to defraud Dewey. The matter of the intent of the defendant was a thing to be determined by the jury, and upon the whole evidence, which has been briefly stated in the abstract, we think the verdict of guilty was wholly authorized. It is not necessary, as has been held, that a party whose name has been forged has suffered actual damage; it is only essential that it appear that if the manifest intent of the defendant had culminated in success, such damage or detriment would follow. (*People v. Turner*, 113 Cal. 278, 280, [45 Pac. 331].)

We have examined very fully the statement of the evidence as brought here in the reporter's transcript, as well as the instructions given by the trial judge. We can discover no error which prejudiced the defendant in his right to a fair trial, and we think that the proof was ample to sustain the verdict.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1634. Third Appellate District.—March 27, 1917.]

GEORGE A. GROTEFEND, Respondent, v. **EDWARD F. MAY et al.**, Surviving Trustees of Trinity Dredging and Hydraulic Gold Mining Company (a Corporation), Appellants.

AGREEMENT CONCERNING LAND PATENT—NATURE OF INSTRUMENT—CONTRACT OF SALE—SPECIFIC PERFORMANCE—BAR BY LACHES.—An agreement between conflicting claimants for a patent to certain mineral lands that an action pending to determine the right to the lands should be dismissed and that the defendant should proceed to obtain the patent, and that when obtained a conveyance should be made to the plaintiff of a portion of the lands, does not create an express trust against which the statute of limitations does not run until the refusal to convey, but is in effect a contract for the conveyance of land, the right to specifically enforce which is barred by laches, where no demand for a deed or action is commenced to enforce the contract until eight years after the obtaining of the patent.

APPEAL from a judgment of the Superior Court of Trinity County. J. W. Bartlett, Judge.

The facts are stated in the opinion of the court.

W. C. Sharpstein, for Appellants.

Thomas B. Dozier, for Respondent.

HART, J.—The following, extracted from the initial brief of the appellant, comprehends a complete and an accurate statement of the facts of the controversy presented for solution by this appeal:

“The second amended complaint alleges two causes of action, both of which, however, are founded on a single written instrument, Exhibit A, which is annexed to the pleading.

“It appears therefrom and from the allegations of the first cause of action that the Trinity Dredging and Hydraulic Gold Mining Company, to which we shall hereafter refer as ‘the corporation,’ was an applicant before the local United States Land Office for a patent to certain mineral lands, including the premises in controversy; that plaintiff filed an adverse to

said application as to practically all of said land, including the premises in controversy, and commenced an action in the superior court pursuant to Revised Statutes U. S., sec. 2326, [5 Fed. Stats. Ann., p. 35, U. S. Comp. Stats. 1916, sec. 4623], 'to determine the question of the right of possession' to the lands embraced in said adverse; that while said action was pending the parties to it entered into an agreement by the terms of which plaintiff was to dismiss said action and his adverse, the corporation was to proceed with its application for patent upon the issuance of which it was to convey the premises in controversy to plaintiff free of encumbrance, who was thereupon to pay the corporation fifty dollars in cash and deliver to it his promissory note for fifty dollars, without interest, payable in six months; that pursuant to this agreement plaintiff did dismiss said action and his adverse, and the corporation prosecuted its application for patent with the result that the patent was issued June 30, 1906; that on November 30, 1907, the corporation became dissolved for non-payment of the corporation license tax and the defendants are the survivors of the directors of the corporation in office at the date of the dissolution; that on April 30, 1914, plaintiff tendered performance on his part and demanded of defendants the deed provided by the agreement, which demand was refused; that this action was commenced May 15, 1914.

"The second cause of action omits all reference to the adverse proceedings by plaintiff in the land office and in the court, but in lieu thereof alleges that the corporation agreed to sell to plaintiff the premises in controversy upon receipt of the patent. Otherwise the allegations are identical with those of the first cause of action."

The defendants interposed a demurrer to each of the causes of action stated upon the grounds: 1. That there was no cause of action stated; 2. That the cause of action was barred by the provisions of sections 337, subdivision 1, and 343 of the Code of Civil Procedure; 3. That the plaintiff has been guilty of laches.

The demurrer being overruled, the defendants answered, and thus, without denying the allegations of the complaint, pleaded the statute of limitations, basing said plea upon the sections of the Code of Civil Procedure invoked and specified in the demurrer; and also pleaded laches.

It was stipulated by the parties that the cause be submitted to the trial court for its decision upon the second amended complaint and the answer thereto, it being further stipulated, in support of the allegations of the answer, that the original complaint in the action was filed and said action commenced on the nineteenth day of May, 1914.

Findings were by said stipulation waived and it was further stipulated that "this stipulation shall form a part of the judgment-roll."

Upon the issues framed as indicated and the above-mentioned stipulation, the court rendered and entered its judgment, decreeing and adjudging that the defendants, within thirty days from and after "the date of service of notice of entry of this decree, make, execute, acknowledge, and cause to be certified, a good and sufficient deed, conveying and assuring the title, and all of the title" to that portion of the lands referred to in the complaint which is described as the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 28, Tp. 36 N., R. 7 West, M. D. M., situated in the county of Trinity.

This appeal is prosecuted by the defendants from said judgment.

It will be observed from the above statement that the parcel of land in controversy is a fractional portion of all the lands mentioned in the complaint, and that the adverse filed by the plaintiff to the application of the defendants for a patent involved all of the lands so mentioned and described, "save and except the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 28, Tp. 36 N., R. 7 W., M. D. M.," within which section all the lands described in the complaint are situated.

The questions submitted for decision by this appeal, as must be obvious from the above statement of the issues, are whether the causes of action set out in the complaint are barred by the provisions of the statute of limitations invoked and pleaded by the defendants or by the laches of the plaintiff.

As seen, the first cause of action stated proceeds upon the theory that the corporation, in prosecuting its application for and obtaining a patent to the land in dispute, acted for and in behalf of the plaintiff and that, upon securing the patent, it became the holder of the legal title in trust for the plaintiff. In other words, the contention is that by the agreement an express trust was created. It is, hence, argued that, since

the statute of limitations cannot run against a trust until the repudiation thereof by the trustee, and, inasmuch as there was no repudiation of said trust until the thirtieth day of April, 1914 (fifteen days preceding the commencement of this action), the statute cannot be invoked to defeat the plaintiff's right of action.

In the second count or cause of action, the complaint, as shown, alleges that by the written agreement referred to the corporation agreed to sell and the plaintiff agreed to purchase the land in question upon the issuance to the former by the general government of a patent to said land. Thus a contract for the purchase and sale of the property is stated.

The plaintiff, however, relies mainly upon the theory upon which the first cause of action proceeds, and, while we may properly assume that the decision of the trial court was founded upon said theory, we are of the opinion that, in either case, the plaintiff's cause of action has lapsed by reason of laches.

Although the plaintiff has set up two different causes of action under the written agreement upon which the action is founded, we must, nevertheless, determine the nature of the cause of action which is available to him under the contract upon which he declares from the nature of the contract itself. (*Burling v. Newlands*, 112 Cal. 476, 494, [44 Pac. 810].) Thus considering and viewing the action, we are constrained to the opinion that it is not, nor could it be, under the agreement, one for the enforcement of an express trust, as counsel for the plaintiff contend, but merely one for the specific performance of the terms of a contract whereby a prospective vendor has agreed, for a specified consideration, to convey to a prospective vendee a certain parcel of land, after the former had acquired title thereto. In other words, we are unable to perceive in the contractual relation established between the parties by the agreement the essential elements of an express trust. Of course, in a sense, there existed between the parties a trust relationship. Nearly all contracts and every agency embrace a trust relationship, but it does not follow that in all such contracts or agencies an express trust is created or that the running of the statute is affected thereby. (*Boyer v. Barrows*, 166 Cal. 757-759, [138 Pac. 354].) Here neither of the parties, although claiming a conflicting priority of right to purchase the land, was vested with the

legal title, the perfection of which in either the one or the other rested upon the event of the prosecution to completion of the requisite proceedings before the land department of the general government. The plaintiff withdrew his application or adverse, and when this was done and the suit arising thereon dismissed, the parties in legal effect conceded that the land in contest was the property of the corporation, subject, of course, to the paramount title of the government. Thereupon the agreement or contract between the parties supervened, which alone formed the basis of any right of action in the plaintiff. (*Stevens v. McCrystal*, 150 Fed. 85, 87, [80 C. C. A. 39].) The agreement, however, bears a close analogy to and is, in effect, one whereby the parties agreed to join in the acquisition for their joint benefit of a certain parcel of land, the one to obtain the legal title and thereupon, for a stated consideration, to convey to the other an interest therein. (*Boon v. Chamberlain*, 82 Tex. 480, [18 S. W. 655].) In that case, the parties had entered into an agreement for the joint acquisition of land, one of the parties impliedly agreeing that, upon securing the legal title, he would convey to the other a half interest therein. The point submitted for decision was whether the action was one for the specific performance of a contract for the conveyance of real property and, therefore, subject to the operation of the statute of limitations as to such actions, or whether the agreement, which formed the basis of the action, created an express trust and the action thereon not barred until there had been a repudiation of the trust. The Texas court thus disposed of the respective contentions of the parties:

"Was the contract between Clark and appellant a contract for the conveyance of real estate? We think it was. It is true that it was a contract for the joint acquisition of lands and not a contract for the sale of lands. It is none the less true that by its terms Clark impliedly bound himself to convey to appellant a half interest in the land as soon as he acquired the legal title. This suit seeks to enforce that contract; that is to say, to have it specifically performed. . . .

"The last question which suggests itself in this case is, When did the cause of action accrue? Did it arise as soon as Clark acquired the legal title, or not until there was some act repudiating the trust? In suits for specific performance of contracts to convey land the cause of action accrues upon

the happening of the condition upon which the vendor binds himself to make the title. (*Glasscock v. Nelson*, 26 Tex. 150.) And so in the case of a contract for the joint acquisition of land, in which it is contemplated that one party shall acquire the title and convey an interest to the other, we see no reason why the latter may not sue as soon as the title is acquired. It may be that, by reason of the trust existing between the parties, equity would not hold the plaintiff guilty of laches until the defendant had done some act which showed that he no longer recognized the trust. Yet the defendant binds himself to make the title to the plaintiff for his interest in the land as soon as he acquires title himself, and we are of opinion that upon a mere failure to do so a cause of action arises." We can perceive no substantial distinction between the agreement in the Texas case and that with which we are here concerned.

The cases cited by the respondent are not conceived to be in point here. For instance, the cases of *Love v. Watkins*, 40 Cal. 547, [6 Am. Rep. 624], and *Luco v. De Toro*, 91 Cal. 405, [18 Pac. 866, 27 Pac. 1082], cited by respondent, were where the parties who were to receive the conveyances had rendered services which were the consideration for the deeds. But in neither of those cases did the agreement create an express trust. Of course, a resulting trust arose and this from the nature of the transaction—not only because of the nature of the agreement, but by reason of the fact that the party to receive the conveyance had performed or executed the consideration for the deed.

In the instant case no money was paid nor service performed as a consideration for the conveyance. Indeed, it does not appear that the plaintiff paid any part of the expense incident and essential to the prosecution of the claim for a patent. There was no relation of confidence subsisting between the parties at the time of the making of the agreement. They were, in fact, in antagonism with each other relative to the contested land until the agreement was entered into between them. Recapitulating, the transaction simply amounted to this: That each of the parties claimed the prior right to apply for a patent. One withdrew his claim and the other agreed that, upon obtaining the patent, he would convey to the former for a specified consideration a certain portion of the land so obtained. As before stated,

we can discern in this transaction nothing more than either a mere agreement for the sale of real property or one for the joint acquisition of real property by the parties for their joint benefit.

But it is claimed that the fact that the effect of the agreement was to create an express trust is evidenced by the recital therein that "the parties hereto have reached an agreement and understanding as to the rights of the several and respective parties." The complaint, however, nowhere directly alleges that the corporation ever at any time acknowledged or conceded that the plaintiff was the owner or entitled to the property described in the agreement. Assuming, therefore, that the recital referred to was amenable to the interpretation to which the plaintiff subjects it, it cannot be considered as in aid of or as supplying pretermitted averments essential to the making of that proposition an issue. In *Hayt v. Bentel*, 164 Cal. 680, 686, [130 Pac. 432, 434], a similar point was made. The court said: "But there is no allegation, in either the complaint or the answer, that plaintiff ever did receive or take possession of the lot. The contract is annexed to the complaint and made a part thereof. But all that is *averred* is that the parties made an agreement for possession, not that possession was in fact delivered. Recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading," citing a number of cases. The reason underlying this rule is that it is only by inference or argument from the recital in the contract that it can be assumed that the fact to which the recital relates existed, "and the rule is as much in force under the code as at common law that argumentative pleading is not admissible." (*Hibernia S. & L. Soc. v. Thornton*, 117 Cal. 481 [49 Pac. 578].)

No reason is to be perceived for doubting that the agreement upon which this action is predicated is a "writing" within the contemplation and meaning of section 337, subdivision 1, of the Code of Civil Procedure; and, while we are of the opinion that a cause of action arose in favor of the plaintiff *eo instanti* upon the acquisition of the legal title to the land by the corporation (*Gray v. Dougherty*, 25 Cal. 266, 282; *Danielson v. Neal*, 164 Cal. 748, [130 Pac. 716]), and that, therefore, no demand for performance was necessary to start the statute to running, yet, assuming that a demand

was necessary for that purpose, the proposition remains that such demand should have been made within a reasonable time after the acquisition by the corporation of the legal title to avoid the intervention of the presumption of the abandonment of the agreement. "Where a party's right to sue depends for its perfection solely upon the necessity of a demand by him to put his adversary in default, he cannot indefinitely and unnecessarily extend the bar of the statute by deferring such demand, but must make it within a reasonable time." (*Thomas v. Pacific Beach Co.*, 115 Cal. 136, 142, [46 Pac. 899]; *Palmer v. Palmer*, 36 Mich. 494, [24 Am. Rep. 605]; *Hintrager v. Traut*, 69 Iowa, 746, [27 N. W. 807]; *Steel v. Steele*, 25 Pa. St. 154; *Bills v. Silver King Mining Co.*, 106 Cal. 9, [39 Pac. 43]; *Hopkins v. Lewis*, 18 Cal. App. 107, 113, [122 Pac. 433].)

Conceding, then, that a demand was necessary in this case, the question arises: Was the demand made within a reasonable time? The answer must be in the negative.

What is a reasonable time in a given case must always depend, of course, upon the circumstances thereof; and, in determining this question where the contract is for the sale of property, and where, as is so in this case, there is no express provision in the contract fixing the time within which the conveyance is to be made, some consideration is to be given to the character of the property which is the subject of the contract, although the general rule is that whether time is of the essence of the contract is to be determined from the terms of the writing itself. (*Skookum Oil Co. v. Thomas*, 162 Cal. 539, 546, [123 Pac. 363].)

Judge Lindley, in his treatise on Mines, volume 2, section 859, says: "The authorities, both in England and America, recognize that where mines or mining property are the subject of the contract time is of the essence, independent of any express stipulation inserted in the instrument."

In *Waterman v. Bates*, 144 U. S. 394, [36 L. Ed. 479, 12 Sup. Ct. Rep. 646], one of the syllabi reads: "Time may become of the essence of a contract for the sale of property, not only by the express terms of the parties, but from the very nature of the property itself; mining property requires the parties interested in it to be vigilant and active in asserting their rights." This rule is approved in *Skookum Oil Co. v. Thomas*, 162 Cal. 539, [123 Pac. 363]. The reason of

this rule is that mining property is of that peculiar character that it is subject to frequent, sudden or great fluctuation in value, and to permit an advantage to be gained or great loss to be suffered by long and unreasonable delay in demanding a conveyance or the money stipulated to be paid for such land would constitute the transaction an unconscientious one.

Under the above-stated principles, and the facts as they are made to appear here, the conclusion is inevitable that the plaintiff, by postponing the taking of steps looking to the acquisition of his rights under the contract, was guilty of laches, and that by reason thereof his right of action on the contract is barred. (*Marsh v. Lott*, 156 Cal. 643, 648, [105 Pac. 968]; *Hopkins v. Lewis*, 18 Cal. App. 107, 113, [122 Pac. 433].)

The land involved in this controversy is admittedly mining property. By the agreement, as we have seen, the corporation bound itself to convey to the plaintiff *when* it acquired title to the land. This agreement necessarily implied that at the same time the plaintiff would perform his part of the contract. And thus the time was definitely fixed when either, by offering to perform the condition to which he had bound himself, could put the other in default. The corporation failed to perform its obligation, and, of course, the plaintiff knew it. He further knew, or at least was well justified in assuming, from the fact that the corporation was as against him an applicant for a patent to the land, that the latter desired to retain it, and this, too, notwithstanding its agreement to relinquish the title to him after the patent was received. If, then, it was his intention or desire to secure the conveyance, he should have been active and vigilant in the matter of the enforcement of his rights thereunder, and not have been guilty of that procrastination or inaction or passiveness which will be held to constitute acquiescence in the breach of a contract of this character or to raise the presumption of the abandonment thereof. Nor has he shown any admissible reason or valid excuse for his long period of inaction and passiveness.

A court of equity does not encourage the litigation of stale claims. It will not grant aid to those who slumber upon their rights. Nothing can call that court into activity but conscience, good faith and *diligence*, and where these (or

any of them) are wanting, it will remain passive and do nothing.

It is further to be suggested that it is to be presumed, from the fact that the title to the property has been in the corporation or its successors (the trustees) during the entire period intervening between the date of the issuance of the patent to the corporation and the date upon which the plaintiff for the first time made a move to secure a conveyance, that the corporation and its successors have paid the annual taxes accruing against said property. The agreement provides that the corporation shall convey the property to the plaintiff "free and clear of all encumbrances," which include taxes and assessments levied upon and against property. (Civ. Code, sec. 1114.) It will hardly be contended that the agreement contemplates that the corporation should be charged indefinitely with the payment of the taxes levied against the property, and, since the duty or obligation of taking the initiative in the consummation of the agreement rested upon the one no less than upon the other of the parties thereto, it would seem that the failure of the plaintiff to offer to pay the taxes which had presumably been paid by the corporation upon the property for over seven years, means a failure to offer to do complete equity in the premises.

The appellant makes a number of other points in impeachment of the judgment, but, as we believe the action here is barred by *laches*, those points need not be considered.

The judgment is reversed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 24, 1917.

[Civ. No. 1652. Third Appellate District.—March 27, 1917.]

MARY SWEENEY, Executrix, etc., Petitioner, v. BOARD OF TRUSTEES OF AUBURN SCHOOL DISTRICT, etc., Respondent.

MECHANIC'S LIEN—NOTICE TO WITHHOLD—SCHOOL PROPERTY—RIGHT OF TRUSTEES.—Under section 1184 of the Code of Civil Procedure, as amended in 1911, providing that upon the giving of a notice to withhold, the owner of property not subject to mechanics' liens shall withhold from the contractor sufficient money to cover the claim embraced in the notice, a school district is justified in refusing to issue its warrant for the balance due the contractor on the construction of a school building, where prior to the demand for the issuance of the warrant, the district was served with withhold notices by laborers and materialmen who performed labor and furnished material for the building.

ID.—RESORT TO BOND—REMEDY NOT EXCLUSIVE.—The remedy given laborers and materialmen to resort to the bond given under section 1183 of the Code of Civil Procedure is not exclusive.

APPLICATION for a Writ of Mandate originally made to the District Court of Appeal for the Third Appellate District to compel a board of school trustees to issue its warrant for the balance due on a contract for the construction of a school building.

The facts are stated in the opinion of the court.

P. H. Johnson, and W. H. Ashby, for Petitioner.

Meredith, Landis & Chester, and Chas. A. Swisler, for Respondent.

CHIPMAN, P. J.—Mandate. It appears from the petition that, on March 29, 1915, defendant entered into a written contract with plaintiff's testate, by which he agreed to furnish the materials and erect for defendant a school building for the agreed price of \$35,725; that before entering upon the performance of said work the said Hayes filed with defendant a good and sufficient bond in a sum not less than one-half the total amount payable by the terms of said contract, which said bond was duly executed, filed, and approved according

to the requirements of the act approved May 1, 1911 [Stats. 1911, p. 1422], entitled "An act to amend an act entitled 'An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal or other public work,'" approved March 27, 1897, "and was given for the purpose of securing the payment of such claims"; that the said Hayes duly performed all the conditions of said contract and completed said building on or about February 12, 1916, and said building was duly accepted by defendant and used thereafter as a public school building; that the whole sum of \$35,725 is long past due and there remains unpaid thereon the sum of \$10,844.75; that at all times mentioned there was in the hands of and subject to the order of defendant, appropriated for the specific purpose of paying said indebtedness, more than sufficient to pay said balance of \$10,844.75; that the final certificate of the completion of said building of the architect of defendant duly issued and is in the hands of defendant; that all payments on said contract were made by warrants drawn by defendant payable to said Hayes; that there is still due, owing, and unpaid to said Hayes on said contract the sum of \$10,844.75 for the payment of which petitioner has duly demanded of defendant the warrant for said sum, but defendant has refused and still refuses to issue the same. The death of said Hayes and appointment of plaintiff as executrix of his last will are alleged.

A general demurrer was filed and also an answer. Among other facts it is alleged in the answer that a large number of persons, naming them, "claim to have furnished materials in the construction of said school building or to have rendered and performed work, labor and services thereon." It is further alleged as follows:

"5. That each and all of said persons have heretofore and had prior to any demand being made on the respondent by the said petitioner herein, or the said George S. Hayes, for an order or warrant for the payment of any sum whatever payable under said contract, made demand upon and filed with respondent notices that they had respectively performed labor, or furnished materials, or both, to the said George S. Hayes, or to other persons claiming to have been acting by authority of said George S. Hayes, and stating in general terms the kind of labor and materials and the name of the

person to, or for whom, the same was done or furnished, or both, and of the whole agreed to be done or furnished, or both. That such notices were respectively delivered by each and all of the said persons, firms and corporations hereinbefore named and left with respondent and were in writing. That each and all of said notices demanded of respondent that it withhold from the said George S. Hayes sufficient money due, or that might become due, to said George S. Hayes to answer such claims and each and all of said respective claims. That said notices in all respects complied with section 1184 of the Code of Civil Procedure.

"6. Avers that the claims of said various persons, and the amounts specified in the notice of the said various persons hereinbefore named filed and left with respondent, exceed the sum of \$21,000.

"7. Avers that neither the respondent, Auburn School District, nor the Board of Trustees of said Auburn School District, nor any member of said board of trustees has any knowledge, information or belief as to, and is ignorant of the merits of, the respective claims of the hereinbefore named persons, firms and corporations to the balance of said moneys payable under said contract, and does not know to whom said balance should be paid."

It was agreed by counsel at the argument that such alleged notices were duly given as alleged, and that the sole question to be determined is whether they justified the defendant in refusing to issue the warrant demanded by plaintiff.

Section 1184 of the Code of Civil Procedure reads as follows: "Any of the persons mentioned in the preceding section, except the contractor, may at any time give to the owner a notice that they have performed labor or furnished materials, or both, to the contractor or other person acting by the authority of the owner, or that they have agreed to do so, stating in general terms the kind of labor and materials and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both, and any of said persons who shall on the written demand of the owner refuse to give such notice shall thereby deprive himself of the right to claim a lien under this chapter. Such notice may be given by delivering the same to said owner personally.

or by leaving it at his residence or place of business with some person in charge, or by delivering it to his architect, or by leaving it at the latter's office with some person in charge. No such notice shall be invalid by reason of any defect in form, provided, it is sufficient to inform the owner of the substantial matters herein provided for. *Upon such notice being given it shall be lawful for the owner to withhold, and in the case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for, the owner or person who contracted with the contractor, shall withhold from his contractor sufficient money due or that may become due to such contractor to answer such claim and any lien that may be filed therefor including the reasonable cost of any litigation thereunder.*"

The question now here arises out of that part of the section quoted in italics. This section has long existed substantially in its present form with the exception that by the amendment of 1911 (Stats. 1911, p. 1315) there was introduced the following in the last paragraph: "and in the case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for," the owner shall withhold, etc. The nature and effect of the notice referred to in the statute as it stood prior to the amendment of 1911 was stated in *Diamond Match Co. v. Silberstein*, 165 Cal. 282, 288, [131 Pac. 874]. It was there said that it was intended to serve as an "equitable assignment"; that the notice "is a form of equitable subrogation regulated by statute," and "entitled the persons serving the notice to receive so much of the money due the contractor as would satisfy the claims of the persons giving notice"; that the "right to a recovery of the money so garnished by the notice does not depend upon the establishment of a lien," but is "a cumulative" remedy. The decisions of the supreme court settling the foregoing principles are cited in the opinion.

The case of *Miles v. Ryan*, 172 Cal. 205, 208, [157 Pac. 5], was a case similar to the one in hand. It was there pointed out that, under the decisions of which *Mayrhofer v. Board of Education*, 89 Cal. 110, [23 Am. St. Rep. 451, 26 Pac. 646], is an example, neither the constitution nor the statute gives laborers or materialmen any lien against public buildings, and in the opinion of the court it is shown why in the very nature of such cases no lien should be given, and that

the rights of laborers and materialmen must be determined by section 1184 of the Code of Civil Procedure. Quoting the provision above italicized, the court said: "The provision in the last quotation referring to property not subject to the liens was added by the amendment of 1911. It merely put in statutory form the previous decisions of this court. In other respects the section is substantially the same as it was prior to said amendment. It has been held that the proceeding authorized by this section is substantially an equitable garnishment by the claimant of the fund due the contractor from the owner (*Bates v. Santa Barbara*, 90 Cal. 543, [27 Pac. 438]), and that it secures to the person giving the notice a claim on the funds due which is paramount to that of the contractor, or any other person claiming under him by assignment or attachment made after the service of the notice. (*First National Bank v. Perris Irr. Dist.*, 107 Cal. 55, [40 Pac. 45]; *Newport etc. Co. v. Drew*, 125 Cal. 585, [58 Pac. 187]; *Long Beach School Dist v. Lutge*, 129 Cal. 409, [62 Pac. 36].) To the foregoing cases may be added *Clark v. Beryle*, 160 Cal. 306, 311, [116 Pac. 739]; *Dorris v. Alturas School Dist.*, 25 Cal. App. 30, [142 Pac. 795]; *Suisun Lumber Co. v. Fairfield School Dist.*, 19 Cal. App. 587, 595, [127 Pac. 349].

Miles v. Ryan, 172 Cal. 205, [157 Pac. 5], involved the priority of right between the labor claimant and an attaching judgment creditor who had served his notice of garnishment or attachment upon the owner before the laborer had served his notice upon the owner. The court held that the attachment took priority. But it very clearly appears that had the laborer's notice been served before the attachment, his claim would have been held good against the fund in the hands of the owner belonging to the contractor by reason of the notice and section 1184.

It is further contended that the remedy given laborers and materialmen to resort to the bond given under section 1183 is exclusive. In the Diamond Match Company case, *supra*, it was shown that the money garnished by means of the notice does not depend upon the establishment of a lien but is a cumulative remedy. The lien provided for is found in section 1183 as is also the bond required to be given. The one is no more exclusive than the other, nor is the remedy by notice less cumulative to the one than to the other. (*Gold-*

tree v. City of San Diego, 8 Cal. App. 505, [97 Pac. 216].) See a very careful and timely opinion as to the purpose and scope of the Amendatory Act of 1911 in *Roystone Co. v. Darling*, 171 Cal. 526, [154 Pac. 15].

The writ is denied.

Burnett, J., and Hart, J., concurred.

[Civ. No. 1941. Second Appellate District.—March 28, 1917.]

BARNETT SCHNIEROW, Respondent, *v.* W. S. BOUTAGY et al., Appellants.

LANDLORD AND TENANT—AGREEMENT FOR LEASE OF STOREROOM—DAMAGES FOR BREACH.—In an action to recover damages for the breach of a contract whereby the defendant agreed to lease to the plaintiff a storeroom then in process of construction, the plaintiff is not entitled to recover any damages for the loss incurred by him in selling his business at another location, as the parties, when they made the contract, did not contemplate that plaintiff in reliance upon their agreement should give his property away or sell it at a sacrifice.

ID.—DAMAGES FOR BREACH OF CONTRACT.—The damages that can be recovered for a breach of a contract are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach; other damages are too remote.

APPEAL from a judgment of the Superior Court of Los Angeles County. Grant Jackson, Judge.

The facts are stated in the opinion of the court.

William H. Fuller, for Appellants.

Baird, Gerecht & Chambers, for Respondent.

SHAW, J.—Plaintiff obtained judgment in the sum of \$502 against defendants as damages for breach of a contract whereby the latter agreed to lease to the former a storeroom then in process of construction. Defendants appeal upon the judgment-roll.

As alleged in the complaint and found by the court, plaintiff in reliance upon defendants' agreement, disposed of his

business on Temple Street at a loss of four hundred dollars, changed his residence at a cost of \$15, and incurred a loss of time, to his damage in the sum of \$87, in securing another storeroom.

Conceding the loss of time and expense of removal incurred by plaintiff so found by the court to have been a detriment proximately caused by the breach of defendants' contract, we are unable to perceive how the loss due to the sacrifice sale of his business could be attributed to such breach. "It is the well-settled general rule of damages for any breach of contract that the damages that can be recovered for a breach are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach. Other damages are too remote." (*Hunt Bros. Co. v. San Lorenzo Water Co.*, 150 Cal. 51, [7 L. R. A. (N. S.) 913, 87 Pac. 1093].) Certainly the parties, when they made the contract, did not contemplate that plaintiff in reliance upon their agreement should *give his property away* or sell it at a sacrifice. In cases of this character, the measure of damages for a breach of contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, sec. 3300.) Upon this record, the loss incurred by plaintiff in selling his business at a sacrifice cannot be attributed to the act of defendants in refusing to comply with their contract. (*Mitchell v. Clarke*, 71 Cal. 163, [60 Am. Rep. 529, 11 Pac. 882].) Indeed, had there been no breach of the contract on the part of defendants, plaintiff's loss would have been precisely the same.

Under this view, it is apparent that the findings do not support the judgment rendered by the court; nevertheless justice between the parties may be accomplished by a modification thereof. It is, therefore, ordered that the judgment be modified by deducting therefrom the sum of four hundred dollars, leaving a balance of \$102; and since as thus modified plaintiff is not entitled to costs (Code Civ. Proc., sec. 1025), the award of \$15.70 as costs of suit is stricken therefrom. As thus modified the judgment is affirmed.

Conrey, P. J., and James, J., concurred.

88 Op. App.—23

[Civ. No. 2050. Second Appellate District.—March 28, 1917.]

E. C. EDDIE, Respondent, v. GAGE MANUFACTURING COMPANY (a Corporation), et al., Defendants; C. E. McCCLAY, Appellant.

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—CONSENT OF LANDLORD—LIABILITY OF ASSIGNORS FOR RENTS.—Written consent given to an assignment of a lease does not have the effect of releasing the lessees from their obligation to pay the rent reserved in the lease, where the assignment imposed no obligation on the assignees to pay the rent, and the consent was conditioned upon the assignees complying with the terms of the lease without any release of the assignors.

ID.—RECOVERY OF RENTS—EVIDENCE—ORAL AGREEMENT TO RELEASE LESSEE.—In an action against the lessees to recover the rents, evidence is inadmissible that the plaintiff orally agreed to release the defendants.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Hyman Schwartz, for Appellant.

T. C. Gould, for Respondent.

SHAW, J.—In this action plaintiff sought a recovery of money alleged to be due under the terms of a lease of real estate made by him to defendants McClay, Gage, Freeman, Lloyd and Gage Manufacturing Company, a corporation, who thereafter by assignment transferred the same to the Union Car Company, a corporation. Judgment went for plaintiff, from which, and an order denying his motion for new trial, C. E. McClay alone appeals.

The instrument whereby the transfer was effected was a naked assignment and did not purport to impose any obligation upon the assignee to pay the rent reserved in the lease. Indorsed thereon and signed by plaintiff, was an instrument in writing as follows: "I hereby consent to the transfer of a certain lease on 683 Antonio St., from Jay Gage, C. E. McClay, O. E. Freeman, and C. T. Lloyd to Union Car Co., a

corporation, provided that said Union Car Co. complies with all the legal formalities through its board of directors, . . . in accepting this transfer and agreeing to comply with the terms of said lease. . . . " While, as shown by the record, the assignee adopted a resolution accepting the assignment of the lease, it made no promise whatever to pay any rent thereunder, nor in any manner whatsoever agreed to comply with the terms of the lease. Under these circumstances, the court properly found this consent to the transfer of the leasehold estate did not release the defendants from their obligation upon the covenant to pay the rent. Indeed, had the consent been unconditional, or had the assignee complied with the conditions so exacted, the finding would not have been subject to attack upon the record here presented. (*Bonetti v. Treat*, 91 Cal. 223, [14 L. R. A. 151, 27 Pac. 612]; *Brosnan v. Kramer*, 135 Cal. 36, [66 Pac. 979]; 24 Cyc., p. 1177.)

Neither, since it would have violated a fundamental rule of evidence, did the court err in refusing to permit defendants to introduce evidence tending to show that plaintiff orally agreed to release appellant and his colessees from any and all liability upon their covenant to pay the rent reserved in the lease.

There is no ground upon which to base the claim of a surrender to the lessor of the leasehold estate by operation of law. As we have seen, the consent made by plaintiff to the assignment was not only upon conditions never complied with by the assignee, and who, as disclosed by the record, never paid any rent to plaintiff, but it did not purport to constitute a release of defendants. No facts whatsoever are made to appear which tend in the slightest degree, by implication or otherwise, to show an intent on the part of the lessor to accept a surrender of the lease. On the contrary, so far as shown, plaintiff looked to appellant and his colessees for the payment of rent and compliance with its terms.

We are unable to perceive any merit in the appeal, and the judgment and order are affirmed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 533. Second Appellate District.—March 28, 1917.]

THE PEOPLE, Respondent, v. JOSE GONZALES,
Appellant.

CRIMINAL LAW—MURDER—EVIDENCE—DYING DECLARATIONS.—In a prosecution for the crime of murder, declarations made by the deceased immediately after being shot that he was done, that he was going to die, and that he thought he was dead, indicate a sense of impending death sufficient to render them, together with certain other statements made at the same time, admissible as dying declarations.

ID.—PREVIOUS THREATS—STRIKING OUT OF TESTIMONY—FOUNDATION NOT LAID.—In a prosecution for the crime of murder there is no error in granting a motion to strike out testimony of previous threats made by the deceased, where at the time the motion was granted, no testimony had been introduced of any overt act or attack upon the defendant by the deceased.

ID.—HOMICIDE—WHEN JUSTIFIABLE.—A homicide is not justifiable unless it is shown that the slayer was at the time of the killing in apparent imminent danger of losing his life, or of sustaining serious bodily injury, and previous threats, unaccompanied by some hostile act, do not afford such justification.

APPEAL from a judgment of the Superior Court of Kern County, and from an order denying a new trial. Milton T. Farmer, Judge.

The facts are stated in the opinion of the court.

W. C. Dorris, and Henry R. Holsinger, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

SHAW, J.—Appellant was convicted of the crime of murder in the first degree, and, in accordance with the verdict rendered, sentenced to imprisonment for life.

Deceased, Abraham Morales, with his wife and others, among whom was appellant, attended a gathering at the house of a neighbor on the evening of August 13, 1916. About 9 o'clock, P. M., defendant requested deceased to step out of the house with him, ostensibly for the purpose of a private conversation; whereupon deceased left his wife and went out-

side with defendant. A few minutes thereafter a pistol shot was heard and Morales was found a short distance from the house, suffering from a bullet wound which caused his death three days later.

The court permitted the prosecution to introduce statements made by deceased immediately after being shot. Their reception in evidence was objected to upon the ground that they were not made under a sense of impending death, and therefore inadmissible as dying declarations. Touching the question, deceased, when found lying upon the ground, among other things, said: "He [referring to defendant] took advantage of me; run me out friendly and now done me. I am done." "Joe [referring to defendant] took advantage of me; got me out there friendly and shot me. Now I am done." "I am done; lift me up." "I am in a dying condition; I am sure I am going to die." "He took advantage of me. I think he killed me all right; I think I am dead." The wife of deceased testified: "He said he was going to die, and that he was going to leave me very far from my parents; that he [Gonzales] had not spoken to him as a man; that if he had spoken to him as a man, he would have defended himself." In *People v. Cord*, 157 Cal. 568, [108 Pac. 514], it is said: "Where a person has been fatally wounded, is in sore distress therefrom, and believes that he will not recover and is soon about to die, his statement made in this belief relating to the cause of his injury is admissible, if it appears that he subsequently died from the direct effects of the wound." Measured by this rule, the admission of the statements so made by deceased did not constitute error.

Testimony was offered to the effect that some three months prior to the homicide, an altercation occurred between defendant and deceased, at which time blows were exchanged, and upon being separated, the deceased said: "Later I will settle this"; and, referring to himself and defendant, said that "they would settle it in a very short time." Objection was made to this line of testimony upon the ground that no foundation was laid for its introduction, since there was no evidence of an overt act or attack being made upon defendant by the deceased. Thereupon counsel for defendant said: "If I can't connect this up, I will consent that it be stricken out." Thereupon the evidence was admitted, and upon the conclusion of the testimony of the witness the district attor-

ney moved to strike out the testimony upon the same ground upon which he had objected to its reception. The motion was granted. In *People v. Campbell*, 59 Cal. 247, [43 Am. Rep. 257], it is said: "If A threatens the life of B, this fact will not of itself justify B in killing A. There must be some act on the part of the person making the threat, from which it appears that there is real or apparent danger of the execution of the threat." When this evidence was tendered there was no testimony whatsoever tending to show any act of aggression committed by deceased at the time of the homicide indicating that he intended to attack defendant. Since there was neither claim nor proof of a hostile demonstration by deceased at the time of the homicide, the fact that he had theretofore made threats against defendant, could not justify the latter in killing him. The law does not justify a homicide, unless it is shown that the slayer was at the time of the killing in apparent imminent danger of losing his life, or of sustaining serious bodily injury; and previous threats, unaccompanied by some hostile act, do not afford such justification. "Previous threats alone, unless coupled at the time with an apparent design then and there to carry them into effect, will not justify a deadly assault by the other party." (*People v. Scoggins*, 37 Cal. 683.) As shown by the record, the objection urged to the introduction of the evidence and the argument used in support of the motion to strike out, as well as the language used by the court in granting the motion, were all calculated to acquaint defendant's counsel with the ground upon which the ruling was made. Nevertheless, he did not offer to reintroduce the evidence, after defendant's testimony was received, to the effect that after the deceased, at defendant's request, accompanied him outside the house, deceased "got mad when I told him about the paper, . . . (and) came after me and struck me three or four times and tore my shirt. It was then that I drew the gun, and he took hold of it and as I pulled the gun back, why the gun went off, and that was all." Assuming the act of deceased to have been such as would have justified defendant in apprehending danger of great bodily harm, there was no evidence of it when the ruling so complained of was made, and no offer to make such showing preceding the ruling of the court, when it must have been apparent to counsel that for want thereof the court deemed it inadmissible. Under

the circumstances shown, it cannot be said the court erred in granting the motion to strike out.

The judgment and order from which the appeals are prosecuted are affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1932. Second Appellate District.—March 28, 1917.]

C. S. YOUNG, Appellant, v. Estate of C. A. CANFIELD, Respondent.

CONTRACT—SERVICES IN PURCHASING LAND—FRACTION OF NET PROFITS ON RESALE—INTEREST NOT CHARGEABLE.—An owner of land is not entitled under the terms of a letter reciting that it was his understanding and agreement that the person to whom the letter was addressed was to have one-third of the net profits arising from the operation or final sale of the property for services rendered in and about its purchase, to deduct from the net profits interest upon the amount of the investment.

ID.—INTEREST—EXPRESS CONTRACT.—The matter of the payment of interest must be made the subject of an express agreement, otherwise it cannot be charged, excepting in case of a loan of money which by section 1914 of the Civil Code is made subject to the payment of interest by presumption.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge.

The facts are stated in the opinion of the court.

James Donovan, for Appellant.

Goodwin & Morgage, for Respondent.

JAMES, J.—Appeal from a judgment entered against the plaintiff. The appeal is presented on the judgment-roll. The facts as they may be gathered from the complaint are as follows: Prior to December 17, 1903, the plaintiff had rendered services to C. A. Canfield, since deceased, in and about the purchase of certain land. Canfield became the owner of

the land and as evidence of the compensation to be paid to the plaintiff for his services, wrote the plaintiff as follows:

"Dear Sir:

"Relative to our understanding at the time of the purchase of the N. E. $\frac{1}{4}$ of Sec. 23-28-27, and in consideration of your services granted in connection thereof, it is my understanding and agreement that you are to have one-third ($\frac{1}{3}$) of the net profits arising from the operation or final sale of the above mentioned property.

"Yours truly,

"C. A. CANFIELD."

The total price paid by Canfield for the land, including taxes, was \$6,765.79. Canfield sold the property on April 30, 1913, for eight thousand dollars; that amount being in excess of the purchase price by the sum of \$1,234.21. The plaintiff duly presented his claim against the estate of Canfield for the sum of \$411.40, being one-third of the apparent profit made by Canfield on his investment. The court found the facts as they were alleged by the plaintiff, but found that there was nothing due the plaintiff for the reason that by adding interest at the rate of seven per cent to the amount of Canfield's original investment, and charging that interest as a part of the investment, no profits resulted by reason of the price obtained at the sale of the property. The one question is presented as to whether interest was properly chargeable under the contract made between Young and Canfield. On the part of respondent the cases of *Hentz v. Pennsylvania Co.*, 134 Pa. St. 343, [19 Atl. 685], and *Barry v. Bernays*, 162 Mo. App. 27, [141 S. W. 933], are cited. In the case first noted the court refers to a work on partnership, and the opinion contains this statement: "There are no profits in a land speculation which does not return to the investor his purchase money with interest upon it." This language is approved in *Barry v. Bernays*, 162 Mo. App. 27, [141 S. W. 933]. As applied to the facts of this case, we are not in accord with the determination of the Pennsylvania and Missouri courts. There was no agreement expressed here for the payment of any interest upon Canfield's investment; the plaintiff had rendered certain services and his compensation was agreed upon in the manner declared in the letter written by Canfield to him. We are of the opinion that the term "net profits," as used in this letter, does not authorize the

charge of any interest amount, and that if such had been in contemplation it should have been expressed. Furthermore, Canfield, for aught that is shown by the pleadings or record presented, might not have been able to have secured a seven per cent income on the money which he invested in the land, nor any per cent at all, for that matter. The general rule is that the matter of the payment of interest must be made the subject of an express agreement, otherwise it cannot be charged; excepting, of course, in the case of a loan of money which by our code is made subject to the payment of interest by presumption. (Civ. Code, sec. 1914.) The general rule which we have adverted to finds expression in *Tirrell v. Jones*, 39 Cal. 655, and *Adams v. Lambard*, 80 Cal. 426, 438, [22 Pac. 180].

The judgment is reversed, with directions to the trial court to enter judgment upon the findings of fact in favor of the plaintiff.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1903. Second Appellate District.—March 28, 1917.]

M. F. O'DEA, Appellant, v. R. G. ROBERTS, Respondent.

APPEAL—ALTERNATIVE METHOD—TRANSCRIPT—NONOBSERVANCE OF COURT

RULE—DISMISSAL.—An appeal from a judgment taken under the alternative method must be dismissed, where the reporter's transcript complied only in form and size with rule 7 of the supreme court and the clerk's transcript consisted of what appeared to be some discarded office copies of the pleadings, findings, and judgment, inserted in the reporter's transcript, which contained neither indexing nor paging that was intelligible.

ID.—FORM AND PREPARATION OF TRANSCRIPT—PURPOSE OF RULE.—The purpose of rule 7 of the supreme court relating to the form and preparation of transcripts on appeal in civil cases prepared under section 953a of the Code of Civil Procedure is not only to secure records of uniform size for the filing cases in the clerk's office, but the presentation of transcripts in orderly and convenient form, properly paged and indexed, for examination by the court in determining the questions involved in the appeal.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge.

The facts are stated in the opinion of the court.

Crouch & Crouch, for Appellant.

Ingall W. Bull, and Harold Larson, for Respondent.

THE COURT.—This appeal purports to have been taken under what is designated the alternative method of appeal and the record prepared and brought up pursuant to the provisions of section 953a of the Code of Civil Procedure. No attempt, however, is made to comply with rule 7 of the supreme court [160 Cal. *xlvi*, 119 Pac. *xi*] as to the form and preparation of the transcript. This rule requires that “Transcripts on appeal in civil cases, prepared under section 953a of the Code of Civil Procedure, . . . must be typewritten and the paper and the backs for binding the same must not exceed ten inches in length and eight inches in width. The leaves must be bound together on the left-hand side in volumes of convenient size. The papers required to be sent by the clerk . . . in civil cases under section 953a, . . . constituting the ordinary judgment-roll, are here designated as the ‘Clerk’s Transcript,’ and the certified transcriptions of the phonographic reporter’s notes required by . . . section 953a in civil cases are here designated as the ‘Reporter’s Transcript.’ The respective papers in the Clerk’s Transcript must be placed in chronological order, and if it is bound with the Reporter’s Transcript, it must come first in order. The pages of the Clerk’s Transcript and those of the Reporter’s Transcript must be numbered separately by consecutive numbers. The lines of each page must be numbered separately and consecutively. An index of each transcript must be inserted at the beginning thereof, referring to each document and to the page beginning the examination, cross-examination, redirect, and recall of each witness.” The reporter’s transcript here presented, in form and size only, complies with the rule. The clerk’s transcript consists of what appear to be some discarded office copies of the pleadings, findings, and judgment, inserted in the reporter’s transcript, which contain neither index nor paging that is intelligible. It is unnece-

sary to direct attention to other matters wherein the transcript is not in accordance with the rule; suffice it to say that it appears to have been prepared without reference to the existence of any rule governing the subject. Obviously, the purpose of the rule is not only to secure records of uniform size for the filing cases in the clerk's office, but the presentation of transcripts in orderly and convenient form, properly paged and indexed, for examination by the court in determining the questions involved in the appeal.

Moreover, the appeal is from a judgment entered on April 13, 1915. The judgment brought up in the purported record which we are asked to review was not rendered nor filed until April 26, 1915. The clerk by his certificate dated April 23, 1915, certifies this judgment so rendered on April 26th, and being the only judgment embodied in the record, to be a true copy of the judgment entered in the above-entitled action. Not only is there no appeal from this judgment, but it is impossible to perceive how the clerk could, on April 23d, have certified to the correctness of a judgment which was not rendered nor filed until three days later. It thus appears that the judgment entered on April 13th from which the appeal is sought to be prosecuted is not contained in the record, and the judgment embodied in the record is not one the correctness of which is authenticated by the certificate of the clerk, or from which an appeal is prosecuted.

The appeal is dismissed.

[Civ. No. 2019. Second Appellate District.—April 8, 1917.]

FRED MEDART MANUFACTURING COMPANY (a Corporation), Appellant, v. WEARY & ALFORD COMPANY (a Corporation), Respondent.

SALE—PAYMENT TO AGENT—ESTOPPEL OF VENDOR.—A vendor of personal property is estopped from claiming that its local sales agent was without authority to receive payment for goods sold by him, on the ground that his authority was limited to the making of sales, where the vendor was notified by the buyer of the latter's intention to make payment to the agent and no objection was raised thereto.

ID.—PRINCIPAL AND AGENT—SALE OF PERSONAL PROPERTY—LACK OF POSSESSION—WANT OF AUTHORITY TO RECEIVE PRICE.—An agent merely for the sale of personal property, not having possession thereof, is not vested with authority to bind his principal by collection of the purchase price.

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul J. McCormick, Judge.

The facts are stated in the opinion of the court.

Bicksler, Smith & Parke, for Appellant.

Gerald Pidge, and Ralph F. Twombly, for Respondent.

JAMES, J.—Suit was brought to recover the sum of \$411.64 alleged to be due and owing to the plaintiff from the defendant on account of the sale of certain merchandise. Judgment was in favor of defendant. The appeal is from the judgment and is presented upon the judgment-roll and a bill of exceptions.

Plaintiff at times material to the controversy was engaged in the city of St. Louis, Missouri, in manufacturing steel office furniture of certain particular varieties. J. M. Bloom was an agent of the plaintiff in the city of Los Angeles. In July, 1913, he quoted to the defendant prices on certain articles of metal furniture. In the letter containing the quotations he stated: "The lockers are made by the Fred Medart Mfg. Co. of St. Louis, for which I am California agent." The offer made by Bloom was accepted by the defendant and the articles of merchandise were thereafter delivered, being billed directly from the plaintiff manufacturing company to the defendant. On December 24, 1913, the plaintiff wrote to the defendant advising the latter that a draft drawn to cover a portion of the purchase price of the merchandise had been returned with the notification from the collecting bank that the drawee was "paying their local agent." The letter also contained the following: "Up to this writing, we have not received the remittance through our local agent and are to-day taking this matter up with him." On January 6th the plaintiff wrote to defendant as follows: "We have not received this remittance, and we again take this matter up

with you and ask that you kindly advise us immediately upon receipt of this letter if you have paid any money to Mr. J. M. Bloom. P. S. If you have not paid this account to Mr. Bloom, kindly mail us check." On January 15th the defendant wrote to the plaintiff acknowledging receipt of the letter of January 6th, and stating to the plaintiff that settlement had been delayed, but that as soon as the goods had been satisfactorily installed, "we will settle in full with Mr. Bloom." It appears to be agreed that full settlement was thereafter made with Bloom, the agent, subsequent to which time defendant received notification from the plaintiff that Bloom was not authorized to accept the payment on its behalf. This suit was prosecuted on the same theory. The trial judge by his findings determined that the merchandise in question was purchased from Bloom and not from the plaintiff, and that Bloom had been fully paid therefor. In view of the fact, as shown by the evidence, that Bloom in his first letter to the defendant gave notice that he was acting as agent for the plaintiff, and also as the merchandise was billed directly from the plaintiff to the defendant, and correspondence was had showing at all times that plaintiff was the principal of Bloom, it must properly be said that the finding referred to is not supported by the evidence. However that may be, the court did find that Bloom received payment in full for the merchandise. This brings us to the question as to whether, assuming that an agency only existed between plaintiff and Bloom, Bloom possessed authority to bind the plaintiff by receipt of the purchase price agreed upon. The rule is of long standing that an agent for the sale of personal property merely, not having possession thereof, is not thereby vested with authority to bind his principal by collection of the purchase price. Our Civil Code, section 2325, provides: "A general agent to sell, who is intrusted by the principal with the possession of the thing sold, has authority to receive the price." Hence the authority of a factor having possession of goods and a mere sales agent without possession, differs. But conceding that Bloom had no authority under his contract of agency to collect the proceeds on the sale of the merchandise furnished by the plaintiff, we think that under the facts here shown there was created for such purpose an agency by estoppel; that is, that the failure of the plaintiff to notify the defendant of the limitation on the agent's authority closed

its mouth against any claim denying that such authority existed. The plaintiff was first advised by letter and by the return of their draft, of defendant's intention to pay Bloom and did not object thereto, but stated to the defendant that they were taking the matter up with Bloom in order to secure the remittance. The next letter written by the defendant to plaintiff again advised plaintiff of the intention of defendant to settle in full with Bloom, which the defendant did. After all the money had been paid, for the first time the defendant is advised that no authority existed in Bloom to make collections on behalf of the plaintiff. We are well satisfied that the payment to Bloom under such circumstances discharged the debt to the plaintiff. (See Mechem on Agency, 2d ed., sec. 932 et seq.)

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1901. Second Appellate District.—April 8, 1917.]

CONNELL COMPANY (a Corporation), Appellant, v.
ARTHUR JENNER, Respondent.

MASTER AND SERVANT—COMPENSATION FOR SERVICES—UNAUTHORIZED RETENTION OF COLLECTED MONEYS.—In an action by a corporation to recover sums of money collected by an employee from debtors of the corporation, he cannot set up as a defense that he had the right to retain such moneys under a claim of increased compensation for his services, where such claim was based upon a notice demanding such an increase to which the corporation never gave its assent, notwithstanding the defendant continued to serve the corporation after the giving of such notice, and the corporation made no objection thereto.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

Stephens & Stephens, for Appellant.

Kendrick & Ardis, J. C. Craig, and Edward Winterer, for Respondent.

JAMES, J.—Appeal by the plaintiff taken from an adverse judgment and presented on the judgment-roll.

The complaint of plaintiff contained statements of four alleged causes of action, the first two only of which need to be considered. In the first cause of action it is alleged that on the first day of February, 1912, and subsequent thereto, defendant was employed by the plaintiff under an arrangement by which defendant was to devote his time and services in the business of the plaintiff for a salary of one hundred dollars per month, with an additional sum of \$20 per month to be paid to him for the use of an automobile. In this cause of action it was further alleged that defendant had received and collected from debtors of the plaintiff the sum of \$443.86 in excess of the amounts which he had earned by reason of the agreement aforesaid, and which excess sum of money he had refused to pay to the plaintiff upon demand. The second cause of action was in the form of a common count for the same amount of money as money had and received by the defendant to and for the use of the plaintiff. By way of answer the defendant alleged that on or about the first day of March, 1909, he entered into an agreement with the plaintiff to render services for the compensation of one hundred dollars per month, and that in May, 1909, there was added to his compensation the sum of \$20 per month for the use of his automobile. He alleged that that arrangement was to continue for a period of one year, but that he continued to render services until December 31, 1910, without any further agreement for a different compensation, and that he collected and received up to December 31, 1910, the sum of \$120 per month according to the agreement, although he alleges that his services were worth the sum of \$150 per month. He then alleged that about the first day of December, 1910, he notified the manager of the company that if he continued to work for the plaintiff company, "he must have \$150 per month," and that he would retain that amount out of moneys collected by him, and that plaintiff nor its manager made any objection thereto; that defendant continued to serve the plaintiff and to retain the sum of \$150 per month; that his services continued up to the fifteenth day of March, 1913. The court made findings by which the facts were determined to be that on or about the first day of March, 1909, the defendant was employed by the plaintiff at the monthly com-

pensation of one hundred dollars, and that about the first day of May, 1909, an agreement was made allowing to defendant \$20 per month additional for the use of an automobile, and that defendant continued in the employ of plaintiff until the sixth day of March, 1913. Further facts are found in the following terms: "That in the month of December, 1910, the defendant demanded of the plaintiff that his salary be thereafter raised to the sum of \$150 per month for his services and for the use of his said automobile. That said demand was made of the plaintiff through the secretary and treasurer of the plaintiff, one Madge H. Connell. That thereupon the said Connell failed to refuse said demand, and failed to accede to said demand, and failed to discharge the defendant from the employ of the plaintiff. That thereafter at the direction of the defendant the bookkeeper for the plaintiff entered upon the books of plaintiff in the account of said defendant for the months of January and February, 1911, a credit to the defendant of \$150 for each of said months as salary. Thereafter the fact of said entries was brought to the attention of the said Connell, who voiced objections to the same to the defendant, and called the attention of the president of the plaintiff thereto. That said president thereupon instructed the defendant that he had no right to raise his own salary, and pursuant to the instructions of said president, on the twenty-eighth day of February, 1911, a charge was made upon said books against the defendant in the sum of \$60 for excess in salary. That at all times thereafter said account upon said books of defendant was credited with the sum of \$120 per month and no more. That said books were at all times open to the inspection of the defendant, and were inspected by him and he had knowledge of the fact of all of said entries. That thereafter up to the time of the termination of the employment of the defendant the defendant and said Connell continued to quarrel and dispute with each other as to the amount of the salary of the defendant." It was further found that it was not true that the defendant was employed for the period of one year, "or for any other definite period of time." It was also found that the defendant had collected the sum sued for by the plaintiff, and that such sum was in excess of the amount of money which would be due him under the compensation as agreed of \$120 per month. It was further found that it was not true that defendant's

services were worth \$150 per month, but that it was true that about the first day of December, 1910, the defendant notified the manager of the company that if he continued to work after the 31st of December, he must have \$150 per month, and that plaintiff nor its said manager made any objection at that time, and that the defendant was credited with the sum of \$150 per month for the months of January and February, 1911. This finding then follows: "That it is true that the services of the said defendant after January 1, 1911, continued during all the time from that date until on or about the fifteenth day of March, 1913, with full knowledge on the part of the manager of the plaintiff and of its directors. But it is not true that said services continued with full knowledge that the defendant has given notice that he would serve the company only on the condition that he was paid or allowed to draw from the company \$150 per month during the time that he served the plaintiff." The findings, as will be noted, were somewhat contradictory. The substance, however, of the findings, to our minds, clearly negatives the conclusion that the defendant at any time was serving the plaintiff company under any different arrangement as to compensation than that originally entered into by him. Up to the time that he sought to secure an increase in compensation there was no dispute as to the terms of his employment, and if he continued to work for the plaintiff without any agreement consented to by the plaintiff which would change that compensation, we think that it must be inferred as a legal conclusion that he consented to work for the compensation theretofore agreed upon. It appears from the findings that while a credit of \$150 per month was entered for two months, that credit was not authorized by the plaintiff company, and that the excess was charged back to the defendant, and that he continued to work many months thereafter with the accounts on the books of the company showing a credit of compensation as originally agreed upon only, and that he had knowledge of the fact that the books were so kept. Counsel for respondent argue that the plaintiff declared upon an express contract which the court found to be different from that alleged; but we do not think that such is the effect of the findings. At any rate, under the allegations of the second alleged cause of action, plaintiff was entitled to have ascertained the amount

due to the defendant in order to have fixed the amount which it was alleged he had collected and not accounted for.

By a supplemental complaint the plaintiff sought to set up certain facts regarding a judgment of the justice's court wherein the assignor of the defendant had brought suit on behalf of the defendant to recover from the plaintiff certain money alleged to be due, and by reason of which judgment it was asserted defendant was estopped from claiming any offset against the demand of the plaintiff. We do not think that that judgment was properly pleaded in bar under the condition of the issues; but in the view we have taken of the case that matter becomes immaterial here.

The judgment is reversed in order that a new trial may be had.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1927. Second Appellate District.—April 8, 1917.]

JULIA P. WARDEN et al., Appellants, v. J. B. CHOATE.
Respondent.

INJUNCTION—TEMPORARY RESTRAINING ORDER—DAMAGES—ATTORNEY'S FEES.—In an action prosecuted for the purpose of obtaining damages alleged to have been sustained by reason of the restraint imposed under a temporary restraining order in an action for injunctive relief, the court properly determined that no attorney's fees were incurred as damages by reason of the order, where it did not appear from the evidence taken, as set out in the reporter's transcript, that any motion was made to dissolve the order, but that the whole of the efforts of the restrained party were directed to resisting the order to show cause, during the pendency of the hearing of which order, the temporary restraining order was made, and which fell of its own weight at the time fixed for the hearing of the order to show cause.

ID.—LOSS OF SALE OF LOT—PLEADING AND EVIDENCE—DAMAGES NOT ALLOWABLE.—In such an action damages are not properly allowable for loss alleged to have been sustained on account of the inability of the plaintiffs to accept an offer to purchase a certain lot due to the fact that they had been prevented from obtaining a deed thereto by the restraining order, where there was no allegation in the complaint or evidence that the lot was worth any less

after the restraining order had become of no effect than it was at any time during the pendency of the restraint imposed by the order.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. John W. Shenk, Judge.

The facts are stated in the opinion of the court.

J. Irving McKenna, and Catherine A. McKenna, for Appellants.

Carlyle Wynn, for Respondent.

JAMES, J.—Appeal by the plaintiffs from a judgment denying them any relief in this action, and also from an order denying a motion for a new trial. The defendant here, in March, 1914, brought an action against these plaintiffs and certain officials of the city of Los Angeles in which injunctive relief was asked for. A temporary restraining order was made pending the hearing of an order to show cause which was set for the sixth day of April, 1914. These plaintiffs appeared in response to the order to show cause and demurred to the complaint of the plaintiff (this defendant), and made a further showing by affidavit in opposition to the application for injunction *pendente lite*. At the time fixed as the return day on the order to show cause, the demurrer was considered by the court and sustained, and the action there ended. This action was prosecuted for the purpose of obtaining damages alleged to have been sustained by reason of the restraint imposed under the temporary restraining order. The action, however, is upon the alleged undertaking of the defendant here, who was plaintiff in the injunction suit, by which in that suit he gave security against damages on account of the restraining order. The security was not in the form prescribed by the code, to wit, by written undertaking, the order to show cause and restraining order as signed by the court reciting that “plaintiff having given cash bond in the sum of \$300 to indemnify defendants against damage by reason of this restraining order,” etc. The question as to whether the acceptance of money in lieu of such undertaking as is authorized by the code to be given upon injunctions

(Code Civ. Proc., sec. 529), was proper, may be passed and it may be considered that it was permissible for the court to require indemnity in that form. In the injunction action it was alleged that the plaintiffs here were the holders of certain property assessment certificates acquired on account of sale of property for delinquent street assessments in the city of Los Angeles, which certificates, and the redemption proceeds from the same, it was sought by the injunction suits to have sequestered or impounded in order that the plaintiff in that suit, he being a judgment creditor of the defendant C. D. Warden, might cause them to be subjected to satisfaction of his debt. The Wardens in this action alleged that they had incurred damages in the sum of three hundred dollars, being money paid as counsel fees for the purpose of securing the dissolution of the temporary restraining order, and further, that by reason of the restraint imposed they had been prevented from securing a deed to a certain lot affected by one of the assessment certificates, and had been prevented from accepting an offer of five hundred dollars made to them for said lot. The court in this case determined by its findings that no amount of attorney's fees had been incurred or paid out by these plaintiffs for the purpose of securing a dissolution of the temporary restraining order. It does not appear from the evidence taken, as set out in the reporter's transcript, that the plaintiffs made any motion to dissolve the temporary restraining order, but it appears that their efforts were directed to resisting the order to show cause. At the time fixed as the return day in the order to show cause they appeared, and their demurrer to the complaint of the plaintiff (this defendant) was sustained. The temporary restraining order fell of its own weight at the expiration of the time limited therein, to wit, at the time fixed for the hearing of the order to show cause. In such a case the court properly determined that no attorney's fees were incurred as damages by reason of the temporary restraining order. (See *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216, [35 Pac. 651]; *Curtiss v. Bachman*, 110 Cal. 433, [52 Am. St. Rep. 111, 42 Pac. 910].) It is contended that the answer of the defendant here admitted that some amount of attorney's fees had been incurred on the behalf alleged; but taking the answer altogether we find that it contains an allegation denying that any damage at all was sustained on the part

of the plaintiffs by reason of the temporary restraining order. Neither was it proper to allow damages on account of the second alleged cause therefor, to wit, by reason of loss alleged to have been incurred on account of the inability of the plaintiffs to accept an offer of five hundred dollars for the lot as before mentioned. There is no allegation contained in the complaint, and neither does the evidence support any such condition, that the lot was worth any less after the restraining order had become of no effect than it was at any time during the pendency of the restraint imposed by that order. We conclude that the judgment of the court was proper and is supported by the record presented.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Crim. No. 388. Third Appellate District.—April 8, 1917.]

**THE PEOPLE, Respondent, v. GEORGE CLAYTON,
Appellant.**

CRIMINAL LAW—APPEAL FROM JUDGMENT—INSUFFICIENCY OF EVIDENCE REVIEWABLE.—Upon an appeal from a judgment in a criminal action the insufficiency of the evidence to support the verdict is reviewable, as well as upon an appeal from an order denying a new trial.

Id.—PREPARATION OF RECORD—SUFFICIENCY OF NOTICE.—In the taking of a criminal appeal it is not essential in the giving of the notice for the preparation of the record, as prescribed by section 1247 of the Penal Code, that any particular form of notice be given, as it is only necessary that the notice set forth in general terms the grounds of the appeal and the points relied upon, and designate the particular portions of the reporter's notes necessary to be transcribed to fully and fairly present such points. The efficacy of such a notice is not impaired by the statement of the appellant therein that he "thinks," or is of the "opinion," that all the testimony is necessary to the full and fair presentation of the points relied upon.

APPLICATION on appeal from a judgment of the Superior Court of Sacramento County for a further transcript

tion and certification of the testimony taken at the trial.
Malcolm C. Glenn, Judge.

The facts are stated in the opinion of the court.

Ralph H. Lewis, and Grover W. Bedeau, for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

HART, J.—Upon a suggestion of diminution of the record, the defendant has applied to this court for a further transcription and certification of the testimony taken at the trial. (Pen. Code, sec. 1247c.) The application is supported by the affidavit of the defendant.

The attorney-general opposes the application for reasons to be hereinafter stated.

The defendant was, on the twenty-first day of November, 1916, found guilty by a jury, in the superior court of Sacramento County, of the crime of grand larceny. On the twenty-fourth day of said month the court pronounced its judgment of sentence upon the defendant, adjudging and decreeing that he be imprisoned in the state penitentiary, at Folsom, for the term of ten years. Thereupon, G. W. Bedeau, counsel for the defendant, announced in open court "that the defendant appealed . . . to the district court of appeal, in and for the third appellate district, from the final judgment of conviction, made, rendered and entered herein this day and from the whole thereof."

On the twenty-ninth day of November, 1916, counsel for the defendant filed with the clerk of the court a written document purporting to be the notice prescribed by section 1247 of the Penal Code upon which, when legally sufficient in all respects, a trial court is authorized and required to order the phonographic reporter who reported the case to transcribe such portions of the notes as in its opinion may be necessary fairly and fully to present the points relied upon by the appellant. Said notice set forth a number of the grounds, including that of the insufficiency of the evidence to support the verdict, which are enumerated in section 1181 of the Penal Code as the grounds upon which an application for a new trial may be made and granted. In addition to the

grounds mentioned, the notice also contained the following statement of the points upon which the defendant intended to rely: "1. Inadmissible and prejudicial statements made by witnesses for the prosecution, irrelevant to the issue, which served to poison the minds of the jury against defendant and prevent him from having a fair and impartial trial; 2. That the chief deputy district attorney, during the course of the trial, and during the course of his closing argument to the jury therein, was guilty of misconduct prejudicial to the defendant and which was intended to and did prevent this defendant from having a fair and impartial trial." The notice then concludes with the prayer or request that the court direct the phonographic reporter, who reported the case, "to transcribe all evidence and proceedings and all objections and exceptions made during the trial, and all rulings made thereon adverse to defendant, and exceptions made thereto, and all remarks of the judge or district attorney, made during the course of the trial and during argument in the presence of the jury, to which defendant objected and excepted." The notice proceeds: "Defendant, in his opinion, thinks it necessary in order to fairly present all his points on appeal, that the phonographic notes of the testimony of all witnesses, all proceedings, rulings and exceptions, had and taken at said trial, and the closing argument of the chief deputy district attorney be transcribed."

As much of section 1247 of the Penal Code as is relevant to the inquiry presented here reads: "Upon an appeal being taken from any judgment or order of the superior court, to the supreme court or to a district court of appeal, in any criminal action or proceeding where such appeal is allowed by law, the defendant, or the district attorney when the people appeal, must, within five days, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken. The court shall, within two days after the filing of such application make an order directing the phonographic reporter

who reported the case to transcribe such portion of his notes as in the opinion of the court may be necessary to fairly and fully present the points relied upon by the appellant."

The position of the attorney-general in opposition to the allowance of the application herein asked for is: 1. That the paper or writing purporting to be the notice required by the above section for the transcription of all the testimony is legally insufficient—that is to say, that it does not comply with the requirements of said section; 2. That the point that the evidence is insufficient to support the verdict cannot be reviewed upon an appeal from the judgment, but only upon an appeal from an order denying a new trial, and that, as the defendant made no motion for a new trial, and so elected to rely for a review of his case solely on an appeal from the judgment, there is no necessity, so far as the question of the insufficiency of the evidence to uphold the verdict is concerned, for a transcription and certification to this court of all the testimony and proceedings of the trial.

We will first consider the point last above stated.

1. Prior to the adoption of the present method of taking appeals in criminal cases, it was requisite, in order to take such an appeal, to file with the clerk of the court in which the action was tried a notice stating the appeal from the judgment or order or from both, and serving a copy thereof on the adverse party. (See Pen. Code, ed. 1906, sec. 1240.) Such appeal, if not from the judgment only, upon the judgment-roll alone, was required to be supported by a bill of exceptions. (See Pen. Code, ed. 1906, sec. 1170.) Section 1171 of said code, as it then read, specified the points to the decision of which exceptions might be taken by the defendant. Under the then system of appellate procedure in criminal cases, as we shall presently see, the defendant could, upon an appeal from the judgment, rely on any of the exceptions specified in section 1170 of the Penal Code, it being necessary, of course, for him to have preserved and presented his exceptions in the manner prescribed by section 1171 of said code, as it then read.

The legislature of 1909, however, introduced radical changes in the system. Sections 1170, 1171, 1172, 1173, 1174, 1175, and 1177, all relating to certain exceptions which might be taken to rulings upon certain matters and to bills of exceptions and the manner of their preparation and settlement,

were in the year mentioned repealed (Stats. 1909, pp. 1083-1086), and a number of new sections, prescribing a different method of taking appeals and preparing the record thereon, were substituted in lieu of the former system. By the change so effected, the defendant may now take an appeal from the judgment by announcing personally or through his attorney in open court, at the time the judgment is rendered, that he appeals from the same; and from any appealable order after judgment by announcing in open court at the time the same is made that he appeals from the same. (Pen. Code, sec. 1239.) Thereupon the clerk must immediately enter in the minutes of the court the announcement of the appeal. The record on appeal must then be prepared, in pursuance of the notice required to be given, in accordance with the provisions of section 1247, *supra*, and the judge must then certify the same as required by section 1247a of said code.

Under the former system, there was no express provision of the Penal Code specifying the points which might be reviewed in criminal cases on an appeal from the judgment. Section 1181 then, as the same section does now, specified certain grounds upon which a new trial might be asked for and granted.

In the case of the *People ex rel. Smith v. Keyser*, 53 Cal. 183, the relator, having been convicted of a felony and duly noticed an appeal from the judgment and the order denying him a new trial, presented a bill of exceptions to the trial judge, who refused to settle the same for the reason that it was not presented within time. The defendant applied to the supreme court for a writ of mandate to compel the trial judge to settle the bill. The court said: "We are of the opinion that the bill of exceptions ought to have been settled by the judge. The defendant may appeal from the judgment, without having made a motion for a new trial; and on the appeal he may rely upon any of the grounds of exception mentioned in section 1170 of the Penal Code, and in such case he must have a bill of exceptions settled, as provided in section 1171." The conclusion thus announced was reaffirmed by the supreme court in *Walker v. Superior Court*, 135 Cal. 369, [67 Pac. 336], and *People v. Walker*, 142 Cal. 90, 93, [75 Pac. 658].

We can discern no just ground for holding, from any change made by the legislature of 1909, or by any subsequent legislature in the procedure relative to appeals in criminal

cases and the preparation of the records thereon, that there is now, under the existing system, any less reason for the application of the rule laid down in *People v. Keyser, supra*, than there was prior to the reform in the procedure referred to. It is true that the ground that the evidence is insufficient to sustain the verdict was not referred to by section 1170, as it then existed, but said section did specify, among others, including that of exceptions to rulings on questions involving the admissibility of evidence, a number of grounds or exceptions which were then and are now reviewable on an appeal from the order, and nowhere in the Penal Code was there a provision expressly authorizing such review of those exceptions. As before declared, there is not now and, so far as we are otherwise advised, there never has been, any express provision in the Penal Code specifically enumerating and so restricting the number or nature of the points which may be reviewed on appeal from the judgment. Upon principle, it seems to us, there is every reason why the assignment that the verdict is not supported by the proofs should be reviewable on such an appeal. If, without express authority therefor, it may with reason be held proper, as the Keyser case holds, that exceptions to rulings upon evidence may be reviewed on an appeal from the judgment, then, *a fortiori*, it is proper so to review the question whether the evidence is of sufficient strength to support the verdict; for the appeal from the judgment involves a direct attack thereon, while a motion for a new trial is a mere collateral assault upon the judgment. Quite consistently, therefore, and, indeed, most naturally, the question whether the verdict is sufficiently supported would arise on an appeal from the judgment, to nullify which or the verdict itself is always the very object of an attack thereon, even where such attack is collaterally made, as on a motion for a new trial.

The attorney-general declares, however, that "wherever an appeal from a judgment only has been taken the only papers which go up to the appellate court are prescribed by section 1246 of the Penal Code." That section provides for the transmission by the clerk of the trial court to the appellate court, upon an appeal being taken thereto, of the papers and proceedings which, properly speaking, constitute the judgment-roll in a criminal case, and they must be so transmitted whether the appeal is from the judgment or from the

order denying a new trial or from both. They now constitute the clerk's record and are so designated, and were formerly included in the bill of exceptions as a necessary part of the record on appeal. As a matter of course, it is indispensably necessary that the record, whatever its prescribed form, should show that a judgment against the appellant had been rendered, whether the appeal be from the judgment or the order or both, otherwise there would be nothing in the record to show that the court below had done anything which would occasion an appeal.

The cases of *Turner v. Bauer*, 28 Cal. App. 311, 312, [152 Pac. 308], and *Mankins v. Forward Movement Syndicate*, 28 Cal. App. 285, [152 Pac. 313], cited by the attorney-general, are wholly inapplicable to any question presented here. In those cases it is merely held, as obviously no other conclusion could be announced, that where the appeal is from the judgment on the judgment-roll alone, the only recourse for the ascertainment of the facts is to the findings, and that in such case it will be presumed that the evidence justified the findings.

But there is still another consideration which, it seems to us, makes it not only proper but quite necessary, in almost all cases, that the record on appeal should contain all the material and important testimony received at the trial, and this arises from the provisions of section 4½ of article VI of the constitution. That section, as is now pretty generally understood, provides that no judgment shall be set aside, or new trial granted in any case, on the ground of errors in instructing the jury or in the rulings of the court on the evidence or in matters of pleading or procedure, unless, after an examination of the entire cause, *including the evidence*, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Thus the appeal courts, as should be so, are expressly enjoined from reversing causes for error occurring in the trial of the case, however obvious and glaring, unless the evidence is of such a character as clearly to disclose that an affirmance would result in a miscarriage of justice. The importance, therefore, of presenting to the court to which the appeal has been taken all the testimony upon the vital points in the case is, if for no other reason than for that purpose, plainly apparent and readily to be apprehended. A reviewing court would hardly

be in a position to determine whether a miscarriage of justice would follow the affirmance of a case in which the trial court had made egregious error in its rulings or instructions unless the evidence in full was before it, thus enabling it to determine, after a review thereof, whether the evidence appeared to be so conclusive of the defendant's guilt as to justify it in reaching the conclusion that an affirmance of the result arrived at by the jury would not produce a miscarriage of justice. But, as declared above, we think the testimony when brought up on an appeal from the judgment may be considered for any of the purposes of the appeal.

2. The notice filed by the defendant for the transcription of all the material testimony was in time and legally sufficient. No particular form of notice is required. All that is necessary is that the defendant shall, within the time prescribed, file a notice containing a statement setting forth in general terms the grounds of the appeal and the points upon which he relies, and designating therein the particular portions of the reporter's notes it will be necessary to have transcribed to fairly and fully present the points relied upon. This he has done, by designating all the testimony taken at the trial. The fact that he stated in the notice that he "thinks," or is of the "opinion," that all the testimony is necessary to the full and fair presentation of the points upon which he relies does not detract from the force or impair the efficacy of the notice for the purpose for which such a notice is required to be filed. In fact, it seems to us that the "designation" in any such case can be the result only of the opinion or belief or thought of the defendant that the testimony designated is necessary for the purposes of his appeal.

It follows from the foregoing views that the application for further transcription of the testimony in this case must be granted. It is, accordingly, ordered that the phonographic reporter, who reported the case, shall, within fifteen days from the date of the filing of this opinion, transcribe all such portions of the testimony taken and received at the trial of this case as have not already been transcribed and incorporated in the record now on file herein in this court, together with such portions of the address to the jury by the chief deputy district attorney as may be claimed to have been legally unwarranted and prejudicial to this defendant's substantial rights, and as are not incorporated in the transcript

now on file herein in this court, and to which remarks the said defendant duly excepted.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 368. Third Appellate District.—April 4, 1917.]

**THE PEOPLE, Respondent, v. MADISON SLAUGHTER,
Appellant.**

CRIMINAL LAW—RAPE—INDICTMENT—ACCOMPLISHMENT OF ACT—DEFECTIVE AVERMENT—LACK OF PREJUDICE.—An indictment charging the crime of rape which uses the word "accomplish," instead of "accomplished," or "did accomplish," in describing the act charged, while grammatically defective, is not prejudicial to the defendant.

ID.—JURY—SUMMONING OF SPECIAL VENIRE—LACK OF PREJUDICE.—In such a prosecution the defendant was not prejudiced by the summoning of a special venire of jurors before the regular panel was exhausted, where all jurors on the latter panel were examined before any name was drawn from the special venire.

ID.—DISALLOWANCE OF CHALLENGE—PEREMPTORY CHALLENGES NOT EXHAUSTED—LACK OF PREJUDICE.—Where a defendant has not exhausted his peremptory challenges he is not prejudiced by the disallowance of a challenge for cause, even if the disallowance is erroneous.

ID.—IMPEACHMENT OF PROSECUTRIX—RIGHT TO EXPLAIN LETTERS AND AFFIDAVIT.—In a prosecution for rape the prosecutrix may explain how she happened to make an affidavit and to write letters denying the accusations which she made against the defendant in her direct examination, which were offered in evidence on her cross-examination for impeachment purposes.

ID.—COMMISSION OF SIMILAR ACTS—PROOF OUT OF ORDER—LACK OF PREJUDICE.—Where in such a prosecution the particular act relied upon for a conviction was stated at the beginning of the trial, it is not error to permit the introduction in evidence out of order of the commission of similar acts.

ID.—COMMISSION OF SEPARATE OFFENSES ON SAME DAY—INSTRUCTION.—Where in such a prosecution there was evidence of the commission of two offenses on the same day, an instruction authorizing a conviction if the jury believed the offense occurred at any time on such day is not erroneous, where by another instruction such general language was limited to the particular offense upon which a conviction was asked.

Id.—PROBABILITY OF COMMISSION OF ACT—SIMILAR ACTS—INSTRUCTION.—An instruction that the jury might consider previous acts similar to the one charged in the indictment as tending to show the disposition of the defendant toward the prosecutrix, and for the purpose of ascertaining whether it was probable that the act charged was committed, is not erroneous as authorizing a conviction upon a probability of guilt.

Id.—PROOF OF FACT—TESTIMONY OF SINGLE WITNESS—INSTRUCTION.

An instruction that the testimony of one witness is sufficient to establish any fact necessary to be proved if believed by the jury beyond a reasonable doubt, is not erroneous, although awkwardly expressed.

Id.—REQUEST FOR READING OF TESTIMONY—VERDICT WITHOUT WAITING FOR—LACK OF PREJUDICE.—The defendant in a criminal action is not deprived of any substantial right to which he is entitled under section 1138 of the Code of Civil Procedure, where the jury after several hours' deliberation requested that a certain portion of the testimony be read to them, and upon being informed that it would take some time to locate it, expressed an opinion that they might reach a verdict without it, which they did.

Id.—RAPE—EVIDENCE—UNCORROBORATED TESTIMONY OF PROSECUTRIX.—

In a prosecution for rape the uncorroborated testimony of the prosecutrix is sufficient to warrant a conviction.

APPEAL from a judgment of the Superior Court of Butte County, and from an order denying a new trial. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

W. H. Schooler, and Madison Slaughter, *in pro. per.*, for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

BURNETT, J.—We are not unmindful of the grave importance of the questions involved in the determination of this appeal. We are appreciative of the significance of the various circumstances connected with the charge and the trial to which our attention has been earnestly invited. We have given serious attention especially to the reiterated and emphatic declaration that appellant did not receive that fair and impartial trial which is the unquestionable right of every American citizen, and we have considered as carefully as pos-

sible the various specified particular grounds for that contention. It is undoubtedly true that a charge of this kind is likely to make such an impression on the minds of many people in the vicinity as to unfit them for that calm, impartial, and deliberate action which the law demands of every juror. The mere accusation when given wings, as usually happens in such cases, excites the prejudice, arouses the resentment, and disturbs and impairs the judgment of a part of the community, and there is danger, of course, that the unfair and hostile attitude toward the defendant thereby engendered may reach the jury-box and even the judge upon the bench. The fact that the one accused is a minister of the Gospel intensifies the situation and increases the probability of unfavorable and malevolent impressions and sentiments. Even upright and righteous persons, with a due conception of the importance and sanctity of this high calling, are sometimes too easily moved to give credence to a story impugning the chastity of one filling the holy office of the ministry and, therefore, also too ready to contribute to the creation of an unfavorable environment for the dispassionate determination of the guilt or innocence of the accused. It is more emphatically true that in every community there are some small souls who, by reason of their sinister and malignant opposition to the cause of religion, and through a depraved desire to cripple the efficiency of religious efforts and to destroy confidence in its advocates and promoters, with avid glee welcome every imputation, especially of the kind involved herein, against the character and standing of a minister of the Gospel. These people generally, also, hasten to prejudge the case, and with feverish anxiety seek to inoculate as many as possible of the community with the virus of their own prejudice and hatred. These and other unfavorable considerations were, no doubt, at work in the community wherein the defendant was tried and convicted, and probably quite a number of the citizens had irrevocably determined his guilt before a witness was heard in court.

However, we feel satisfied that the vast majority of the people of Butte County, moved by the spirit of fair play and a desire that there be no unwarranted interference with the orderly processes of the law, were in that mental and moral frame of mind essential to the impartial administration of justice as between the plaintiff and defendant.

But, what is more to the point, we are convinced from an examination of the record that there was no such prejudice or hostility on the part of the trial judge, or of any of the jurors, nor was there any misconduct on the part of either, nor any such acts or omissions during the course of the trial as would legally justify this court in setting aside the verdict. We go further, and say that in none of the contentions of appellant do we find sufficient merit to warrant any interference with the judgment of the lower court, as will more fully appear while we proceed to notice the specific points which are urged upon our attention with great ability and impressiveness in the four different briefs filed in his behalf, three of which, bearing his own signature, were undoubtedly prepared by a former astute member of the bar now sojourning at San Quentin.

The indictment is grammatically defective in using the word "accomplish," instead of "accomplished," or "did accomplish," but while the district attorney thus manifested a degree of carelessness it is perfectly apparent that the defendant suffered no prejudice by reason of the defective averment. The charging part of said instrument is as follows: "The said Madison Slaughter on or about the 7th day of November A. D. nineteen hundred and fifteen at the county of Butte and state of California, and before the finding of this indictment wrongfully, unlawfully, willfully and feloniously accomplish an act of sexual intercourse with one Gertrude Lamson, . . . a female under the age of eighteen years, to wit, the age of fifteen years," etc. If any one at all familiar with the English language could not understand that the intention was to charge that the said Madison Slaughter "did accomplish" the act on said date his sanity would be the proper subject for investigation. And yet, with great earnestness and apparent sincerity, it is argued that the cause should be reversed for this verbal inaccuracy. We are spared any further comment, however, for the reason that the identical point was decided in the case of *People v. Haagen*, 139 Cal. 115, [72 Pac. 836], wherein it was said: "We do not think there is any merit in this contention."

The jurors drawn on the regular venire were insufficient to complete the jury and a special venire was issued. This is made the subject of criticism and complaint by appellant, but the practice is authorized by the code and sanctioned by the

decisions of the courts. (Code Civ. Proc., secs. 226, 227; *People v. Sehorn*, 116 Cal. 503, 508, [48 Pac. 495]; *People v. Suesser*, 142 Cal. 354, 359, [75 Pac. 1093].) In the Sehorn case it was said: "There may, no doubt, be cases where, as was said in *Levy v. Wilson*, 69 Cal. 105, 111, [10 Pac. 272], the drawing of the entire jury from the box would be 'more consistent with the correct administration of justice,' but it has frequently been held, with respect to both grand and trial jurors, that after the venire drawn from the regular jurors had been exhausted the court may order additional jurors to be summoned from the county at large, and that such proceeding is valid—at least, unless there has been a gross abuse of discretion." There is nothing in the case here to show that the discretion thus vested in the trial court was not properly exercised. No doubt the special venire was ordered to save time and expense, and we are not authorized to conclude that appellant suffered any prejudice thereby. The fact that the order was made before all the jurors on the preceding venire had been examined is of no moment, since such examination was completed before any name was drawn from the special venire. The procedure was at most an irregularity which worked no damage.

Complaint is made that the court improperly overruled defendant's challenge to certain jurors for bias. Of the twelve selected it is not pretended that such objection could be made to more than two. These are John Finning and T. R. Boalt. As to the others there can be no possible controversy. The court might well have excused Mr. Finning, although he declared that he could and would disregard his opinion, and be controlled entirely by the evidence and the instructions. However, his was a doubtful case, and there should be no hesitation in resolving such doubt in favor of the defendant. But for the reason that he accepted the juror while still having five peremptory challenges, appellant is in no position to complain of the ruling. The point is covered and controlled by the cases of *People v. Durrant*, 116 Cal. 179, 196, [48 Pac. 75], *People v. Schafer*, 161 Cal. 573, 576, [119 Pac. 920], *Scragg v. Sallee*, 24 Cal. App. 133, 139, [140 Pac. 706], and *People v. Perry*, 25 Cal. App. 337, 338, [143 Pac. 798]. Therein this and the supreme court approved the doctrine stated in Thompson on Trials, section 120, as follows: "It is a rule of paramount importance that errors committed in

overruling challenges for cause are not grounds of reversal, unless it be *shown an objectionable juror was forced* upon the challenging party *after* he had exhausted his peremptory challenges; if his peremptory challenges remain unexhausted, so that he might have excluded the objectionable juror by that means he has no grounds of complaint." It is true that his peremptory challenges were finally exhausted, but not until he had accepted Mr. Finning and he was sworn to try the case. In *People v. Riggins*, 159 Cal. 113, [112 Pac. 862], relied upon by appellant, it appears "not only that the defendant exhausted all his peremptory challenges, but that by reason of the rulings of the court he was forced to accept McKeen, a juror objectionable to him and challenged by him for cause and also that he asked the privilege of challenging McKeen peremptorily and that his request was denied." The rule is one not only of expediency but of justice. The peremptory challenge affords an auxiliary or additional method for getting rid of an objectionable juror. If the defendant feels that a juror is disqualified he may challenge him for cause, but the court may not concur in that view. If so, and the limit of peremptory challenges has not been reached, the defendant must avail himself of that remedy or else be deemed to have waived his objection. When the peremptory challenges have been exhausted the situation, of course, is quite different, as he then has only the one remedy, and in case of an adverse ruling he may have it reviewed by the appellate court. Such is the instance of juror Boalt. On his direct examination he testified that he had an opinion in regard to the case and, asked as to how it was formed, he answered: "By newspaper talk and talking on the streets," and, in reply to the question: "In what other manner if any was this opinion formed?" he said: "I have heard a few words that took place here, I heard of some parties who talked with parties that were here who quoted me about ten words." If it be argued that he meant by these answers that his opinion was influenced by the ten words that had been repeated in his presence, we cannot assume that they were prejudicial to appellant, since it does not appear what they were. Besides, in the further course of the examination, he stated that his opinion was founded entirely upon newspaper reports and street gossip, and still further that his opinion was based only upon "what little I read in the paper." It was, therefore, for the trial

court to determine what was the source of his opinion, and the decision is binding upon this court. Indeed, the examination of the juror presents an instance for the application of the rule laid down in *People v. Ryan*, 152 Cal. 364, 371, [92 Pac. 853], and *People v. Edwards*, 163 Cal. 752, [127 Pac. 58], and other decisions. In the former it is said: "The trial court must decide which of the answers most truly shows the juror's mind." Indeed, so far as we can judge from the cold record, Mr. Boalt was unbiased and entirely disposed to be fair and just. He declared several times that he would lay aside any opinion that he might have and be guided entirely by the evidence and the instructions of the court, and that he would act fairly and impartially in the case. As we read the record we are satisfied there is no just ground for complaint as to the selection and impanelment of the jury.

Among the many questions presented as to the admissibility of evidence, we notice first the ruling of the court in relation to the explanation by the prosecutrix of an affidavit and two letters made and written by her. These instruments were secured by the defendant and offered in evidence on her cross-examination.

The first letter was addressed to Mr. Kennedy, one of the counsel for appellant, was dated February 19, 1916, and was as follows:

"I am writing this of my own free will, and under no one's influence. I have done a very great wrong which I am very sorry for and want to correct. I have told an outrageous lie. I don't know whether anyone will speak to me or not; I hope they will. That what I have charged against Mr. Slaughter is an absolute lie, which I want seen to and done away with soon as possible. And I will say with the oath of God I will never tell another lie to anyone of any kind again as long as I lives. I was very angry when I told this lie and the second one I told it to encouraged me so much I kept it up. Now I deny it and deny it forever. Remember no one has influenced me in any way only to tell the truth. Unless it was the party's that got me in this mess."

The other letter was directed to "Mr. and Mrs. Slaughter and Girls" and was of similar tenor. It concluded with the declaration: "I am sorry to the bottom of my heart and soul and experience has been a very dear teacher to me and I mean to begin over again and live a new good right life."

The affidavit is clearly in the language of an expert, and not such as would have been chosen by the prosecutrix. Therein, among others, were the statements that said letters contained the truth, that she was not influenced by Mr. Kennedy to write the same but did so of her own free will; that said statement was made to right a great wrong; that she never had sexual intercourse with defendant at any time or place and that he had always acted toward her "in a proper, gentlemanly and straight-forward way"; that the affidavit was made to rectify a great wrong, and while made at the request of Guy R. Kennedy it "has been read to me and the entire contents of the same is the truth, the whole truth and nothing but the truth." The witness also testified on said cross-examination as to declarations she had made to Mr. Schooler, one of the attorneys for appellant, denying any improper relations with Mr. Slaughter. Over strenuous objections the witness was permitted to explain these various statements, and to detail the circumstances under which they were made. The purpose was, of course, to show the undue influence that was exerted in behalf of appellant, and to minimize or nullify the effect upon her credibility of her different contradictions. It was the theory of the plaintiff that a conspiracy existed in which the mother, father, and defendant with his attorneys participated, designed to coerce the witness into a renunciation of her charges and an abandonment of the prosecution. On redirect examination the people, therefore, in support of the contention, were permitted to show that she was told her mother's health was bad and that she would cause her death if she persisted in the prosecution; that defendant himself brought her father, Frederick Lamson, to his daughter, and the father said: "There, see what you have done, you will kill your mother"; that one of the defendant's attorneys came in the night-time to her home to use his influence upon her; that her mother told her the defendant should not be prosecuted; that statements were made by defendant's attorneys calculated to induce the belief that she would get into trouble if she insisted upon the charge against Mr. Slaughter, and some other circumstances of similar tenor were related by the witness. To illustrate this line of examination we may set out her statement of what her father said to her: "He had told me that he believed my story and that he had believed it all along, but for me not to say anything or not

to tell mamma that he did, or to tell anybody and during the time mamma was having these spells he said: 'Whatever she said to answer yes and never to dispute her in anything,' and he said that I would probably be the cause of her death anyway." We think there was no violation therein of the familiar rule permitting a witness to explain contradictory statements. It would be strange if her mouth were closed as to the circumstances and inducements of the transaction called out on cross-examination for the purpose of impeaching her veracity and destroying her credibility. Some portions of said testimony may have been objectionable, but there was no motion to strike them out, and the questions themselves were entirely proper. Of course, the only purpose of such examination is as we have indicated, and her recital of certain statements made to her was not to be considered as evidence of the truth of said declarations. If this was not made entirely clear to the jury it was the fault of appellant in not requesting a specific direction to that effect.

In *People v. Smallman*, 55 Cal. 185, on the cross-examination of the prosecuting witness, defendants, for the purpose of affecting her credibility, offered an affidavit made and signed by her but written by one Carey who presented and read it to the witness. On the direct examination the witness was asked as to the circumstances under which the affidavit was made, and what conversation she had with Carey about it. The defendants objected to any conversation of witness with Carey in relation to this affidavit which was had in the absence of the defendant. The court overruled the objection and admitted the evidence. The supreme court said: "We see no error in this ruling. It was proper to ask the witness as to every matter which occurred in relation to and in connection with the affidavit."

In *People v. Wessel*, 98 Cal. 352, [33 Pac. 216], the court said: "To contradict the testimony of the prosecutrix, who was a child of eleven years, the defense read the testimony before the committing magistrate, in which it was claimed she had made statements inconsistent with her evidence on the trial. Thereupon the prosecution recalled the prosecutrix and asked her to explain the discrepancies. This course was too plainly proper and of too common practice to justify the presentation of the question here."

In *Bradford v. Woodworth*, 108 Cal. 684, [41 Pac. 797], it was said: "It was proper to permit plaintiff to explain in rebuttal the telegram which had been introduced by the defendant to contradict his testimony." (See, also, *People v. Glover*, 141 Cal. 233, [74 Pac. 745]; *Risdon v. Yates*, 145 Cal. 210, 212, [78 Pac. 641]; *Hoggan v. Cahoon*, 31 Utah, 172, [87 Pac. 164]; *Strebin v. Lavengood*, 163 Ind. 478, [71 N. E. 494].)

The prosecution adopted a circuitous method of obtaining the explanation, and asked of the witness many unnecessary questions, but circumlocution or volubility is not necessarily error. The witness was not lacking in intelligence or assurance, and a simple question as to why she made such contradictory statements would probably have produced the explanation and avoided the necessity for such protracted and wearisome examination. However, the defendant opened the door for an investigation of the reasons that moved and influenced the witness to make such contradictory statements and we find therein no prejudicial error. The cases cited as to this point by appellant do not sustain his contention.

In *Wagner v. People*, 30 Mich. 384, the evidence brought out on the cross-examination was incompetent, although admitted without objection, and it was correctly held that this hearsay evidence was not subject to modification or explanation on the redirect examination.

The later Michigan case, *People v. Hanifan*, 98 Mich. 32, [56 N. W. 1048], supports respondent's position here. Therein it was held that "where, on the trial of a respondent for larceny, his counsel show on the cross-examination of one of the people's witnesses, that the witness had some trouble with the respondent subsequent to the alleged larceny and that he would like to get even with respondent, it is proper to permit the witness, on his redirect examination, to explain the nature of the trouble."

In *Atherton v. Defreeze*, 129 Mich. 364, [88 N. W. 886], where the relevant part of a conversation was received it was held that on cross-examination it was not proper to introduce another part of the conversation which had no connection with the issue involved, and had no bearing whatever upon the part that was relevant.

The case of *Garey v. Nicholson*, 24 Wend. (N. Y.) 350, is of similar import. Referring to the rule that where a part

of a conversation is introduced in evidence by one party the other has a right to call for the whole conversation, the supreme court of New York said: "That, however, must obviously mean that the additional conversation called for should be relevant to the matter in issue. All evidence is received under that qualification; and if not so restrained, might operate as a waste of time. Other subjects might be introduced having no connection with the subject matter of the suit."

Commonwealth v. Keyes, 11 Gray (Mass.), 323, is to the same effect. In reference to the complaint of the defendant that she was debarred from proving the residue of a conversation of which a part had been produced by the prosecution against her, it was declared by the supreme court of Massachusetts: "The proof in such case is to be confined to what was said upon or concerning those matters which are made subjects of inquiry or investigation. Every remark or observation made upon those topics is to be received as competent evidence because they may essentially modify the character and purport of the whole conversation and vitally affect what might otherwise appear to be explicitly asserted or denied. (1 Greenl. Ev., secs. 201-218.)"

A great many other rulings of the court as to the admissibility of evidence are severely criticised by appellant. We do not feel called upon to notice them specifically, although they have been carefully examined. Some of them, it may be said, are of doubtful propriety, but it could hardly be otherwise, considering the mass of testimony and the multitude of objections. However, as before stated, we find in none of the rulings any warrant for a reversal of the judgment. Each side was very swift to object to questions propounded by the other, and thereby the time of the trial was greatly extended and the labor of the trial judge was largely increased. In the heat of the contest, also, counsel indulged in frequent interruptions and in occasional acrimonious suggestions which no doubt tried the patience of the court, but we believe the trial was conducted with due regard for the proprieties of juridical procedure.

That other acts of a similar nature were permitted to be shown out of order was not error, in view of the fact that at the beginning of the trial the district attorney made and stated the election of the prosecution as to the particular

offense for which a conviction was asked. (*People v. Koller*, 142 Cal. 621, 624, [76 Pac. 500].)

Earnest objection is made to this instruction given by the court: "The indictment in this case charging defendant with the offense for which he is now on trial was filed January 31, 1916. In that indictment it is alleged that the offense was committed by defendant on or about the seventh day of November, 1915, and before the finding of the indictment. It is not necessary to prove the commission of the offense now on trial at the precise time or date alleged in the indictment, but it is sufficient to prove its commission at any time on November 14, 1915, if the evidence proves beyond a reasonable doubt that defendant on said last-mentioned date has been guilty of the offense of rape charged in the indictment." It is not claimed that the people are confined to the precise date contained in the indictment, and it is admitted that ordinarily the instruction would be unobjectionable, but it is insisted that by reason of the fact that there was evidence of two separate offenses on said date of November 14th, the instruction authorized a conviction if a part of the jury believed that one and the remaining jurors believed that the other was established, although there was no concurrence of the twelve as to either of said declared offenses. There would be much force in this criticism were it not for the fact that this instruction was qualified by another reading as follows: "I will instruct you now that wherever in these instructions I have referred to the act as charged of November 14, 1915, I referred to the act charged as having been committed on a chair in the dining-room as charged in the evidence as the only act upon which he is now on trial." This was not inconsistent with the former, but a definite limitation of the more general language, and it removed any probability of the result apprehended by appellant. (*People v. Besold*, 154 Cal. 363, 370, [97 Pac. 871].)

In instruction No. 42 the jury was directed that they might consider previous acts similar to the one charged in the indictment as tending to show the disposition of the defendant toward the prosecutrix, and "for the purpose of ascertaining whether it is or is not more probable that the act of sexual intercourse charged to have been committed on November 14, 1915, was committed, and for no other purpose." There is no merit in the contention that thereby the jurors were in-

structed that they might convict upon a probability of guilt. It signified no more than an instruction that they might consider such evidence as bearing upon the question of appellant's guilt or innocence of the charge made in the indictment. If they were to consider it at all it is difficult to understand how it could be regarded except as relating to the probability of guilt. As to the rule requiring the jury to be convinced beyond a reasonable doubt of the defendant's guilt in order to convict they were fully and repeatedly instructed. It may be said that a similar instruction to the one before us was approved in *People v. Mathews*, 139 Cal. 527, 530, [73 Pac. 416].)

Instruction No. 40 was to the effect that in such prosecution the testimony of one witness is sufficient to establish any fact necessary to be proved if believed by the jury beyond a reasonable doubt. There can be no fault found with the principle therein declared, although it is somewhat awkwardly expressed. The jury, though, could not have been misled by it.

The defendant requested an instruction as to the presumption of innocence. Therein was an expression that "this presumption is an instrument of proof," and it is contended that this specific affirmation ought to have been brought to the attention of the jury. It is perfectly clear, however, that the consideration which should be accorded to this presumption was fully set forth in several instructions given by the court. That it was not designated as an "instrument of proof," or "evidence," is a mere verbal criticism without merit. (*People v. Linares*, 142 Cal. 17, [75 Pac. 308]; *Agnew v. United States*, 165 U. S. 630, [41 L. Ed. 624, 17 Sup. Ct. Rep. 235].) The fact is that the rejected instruction would have added nothing to the following which was given: "The jury is instructed that the defendant comes before you clothed with the presumption of innocence and that such presumption is not a mere form to be disregarded by the jury at its pleasure, but it is a substantial part of the law of the land, and binding on the jury in this case, as in all criminal cases, and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and to acquit him, unless the evidence in this case convinces you of his guilt as charged, beyond all reasonable doubt; and you are compelled under your oaths to carry this presumption in your minds during

every stage of the trial, and give the defendant the benefit of it until such time as you may be convinced beyond all reasonable doubt of his guilt, as charged in the specific offense elected by the prosecution, that of November 14, 1915." The foregoing was given at the request of appellant and leaves nothing to be desired on the subject. Indeed, the jury were fully and correctly instructed on every material phase of the case, and no just criticism can be made of the court in reference to the instructions given or refused.

After the submission of the cause and the jury had deliberated for several hours they returned and, through their foreman, made a request to have a portion of the testimony read. The proceedings in relation to it are shown by the record as follows:

"Foreman Darrell: If the court please, we wish to apologize to your Honor and the attorneys and the court officials and others present for causing you to convene court at this time, but there are certain points in the evidence upon which we do not agree and we deem it necessary that the evidence be read. The clerk has the memoranda for the evidence we desire.

"The Court: Yes, I see. Mr. McCallum, you have seen that memoranda, have you—show it to Mr. Schooler."

At this time Mr. Schooler examines note containing request for testimony.

"The Court [to the reporter]: How long would it take you, Mr. McCallum, to prepare yourself to read that to this jury?"

The testimony requested by the jury to be read included the testimony of Gertrude Lamson, cross and direct, and that of Thomas Whidden and Mrs. Whidden. At this time the reporter stated that in order to go over the entire direct and cross-examination of Gertrude Lamson, of Thomas Whidden, and of Mrs. Whidden, which testimony extended continuously over a period of approximately four days, that he might be able to locate the particular testimony desired in an hour, but in order to look over all the testimony mentioned by the jury and to locate it in its entirety with the required certainty necessary, it would take perhaps several hours, and that to read the entire testimony mentioned, thus entirely avoiding the danger of omitting any portion of that men-

tioned by the jury, that it would require at least three days' time.

"Foreman Darrell: If the court please, it is just a slight portion of the evidence of the witness referred to in the memoranda we desire.

"The Court: I see, but we have to give the reporter some time to look it up. I will have to give him some time to report to me that he has found it. You see that big stack of books before him there, gentlemen; they contain the evidence that he has to seek through and get the line and the sentences that you want in order to cover your request fully.

"Foreman Darrell: Providing we determine to get along without this testimony, if after debating the matter further we can proceed without this particular evidence then what?

"The Court: It is for you gentlemen of the jury, when you get ready to report a verdict—if you find a verdict to notify the officers and they will notify the rest of us.

"Foreman Darrell: My point was this, that I do not believe that those who desire the reading of this portion of the testimony—in fact I am sure that they were not aware that it would take any considerable time to produce that. There was simply a question that arose upon which we could not agree. As stated in the memoranda, we were under the impression that it required only a few moments, as it was a very small part of the evidence that was given by those three parties that we wanted.

"The Court: I do not know of anything to do only to let you go to your jury-room and let the reporter go to work and find the testimony that you want and when he finds it we will report to you. You can now return to your jury-room. [In accordance with the foregoing proceedings, after the jury retired again to their jury-room to deliberate further, the reporter proceeded to locate through the testimony of the foregoing named three witnesses, covering some one thousand or one thousand two hundred pages of shorthand, the portions thereof covered by the memoranda submitted to the court by the jury and awaited a further call from the jury.] At this time, to wit, 9:10 o'clock A. M. on this thirteenth day of May, 1916, after having been out all night, the jury returned into the courtroom and the following proceedings are had": Then follows the announcement of the verdict

in the usual manner without any further reference to said testimony.

Section 1138 of the Penal Code provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the district attorney, and the defendant or his counsel, or after they have been called."

It is the claim of appellant that to his prejudice he was deprived of the substantial right to which he was entitled by this statute, and therefore his conviction should be reversed. His contention is not supported by the record. The statute must, of course, have a reasonable construction. No one but the reporter could furnish the information, and he could not do so without laborious investigation. He made the effort and located the testimony, but at what time he was prepared to read it the record does not show. It may have been after the verdict was reached by the jury. At any rate, there was no disposition apparently on the part of said reporter, or of the trial judge, to withhold from the jury what they requested, and preparation was made to comply with the request. But it is manifest that the jury, after further consultation, concluded that they did not need the additional information, and they could and did agree upon a verdict without waiting to have the said testimony read. As seen, it had been stated by the foreman that they might thus be able to agree, and we must conclusively presume, in the absence of any showing to the contrary, that they were entirely satisfied to forego the reading, believing that it would not affect their conclusion as to the guilt of the defendant. There is nothing in the matter to indicate any improper conduct on the part of any officer of the court or of the jury, nor can it be said that any harm was thereby done to appellant.

It is insisted with frequent repetition that there is no proof of the act upon which the district attorney elected to rely. In this, appellant is entirely mistaken. The evidence is set out in the brief of the attorney-general. The salacious story need not be repeated. The testimony of the prosecutrix is

direct and positive as to the consummation of the offense at the time and place alleged. Her credibility was, of course, matter of argument before the jury and the trial court. The considerations suggested, affecting her veracity, were, no doubt, forcibly presented at the proper time in that tribunal, but they failed of their purpose, and we are in no position to say that she did not tell the truth when she attempted to relate the occurrence in question.

Appellant is also in error when he asserts that the uncorroborated testimony of the prosecutrix is insufficient to warrant a conviction. There are some early decisions to that effect, but such is not the law as now recognized in this state.

In *People v. Logan*, 123 Cal. 414, [56 Pac. 56], it is said: "Upon the trial of a defendant accused of rape, if the evidence of the prosecuting witness is sufficient to support the verdict, the truth or falsity of her evidence is a matter for the jury, and a verdict of conviction will not be disturbed, notwithstanding conflicting evidence for the defendant, and notwithstanding the circumstances and conditions forming part of the *res gestae* of the offense are unusual, and not entirely convincing."

It is true that her testimony should be clear and convincing, but it is for the jury and the trial judge to determine whether it fulfills that requirement, and the record here shows that their conclusion was against the contention of appellant. We may say, also, that there was some circumstantial corroboration of the testimony of the prosecutrix to which, no doubt, some heed was given. Manifestly, the jury should exercise the greatest care and circumspection in considering the evidence in cases of this character, as was aptly said in *People v. Price*, 26 Cal. App. 544, 550, [147 Pac. 591]. They were so instructed in the present instance and we cannot say they failed to observe the admonition.

Many circumstances tending to discredit her testimony are pressed upon our attention. It is urged that she was strongly impeached and discredited by her own voluntary and repeated repudiation of the charge, that it is so inherently as well as circumstantially improbable, and the great preponderance of the evidence is to the effect that the testimony given by her on the trial of the case is absolutely false. Hence it is argued that the verdict must be the result of passion and prejudice, and "a conviction upon such evidence would be

a blot upon the jurisprudence of the country and a libel upon jury trials." (*People v. Hamilton*, 46 Cal. 540.)

That she had made contradictory statements was, as we have seen, the subject of explanation and the value of it as a probative fact was for the jury. That on behalf of the defendant there was much evidence in irreconcilable conflict with the testimony of the prosecutrix cannot of itself justify us in setting aside the verdict. These considerations are amply discussed in *People v. Kaiser*, 119 Cal. 458, [51 Pac. 702], *People v. Lewis*, 18 Cal. App. 359, 364, [123 Pac. 232], *People v. Preston*, 19 Cal. App. 675, 679, [127 Pac. 660], *People v. Crawford*, 24 Cal. App. 396, 403, [141 Pac. 824], *People v. Rongo*, 169 Cal. 71, 75, [145 Pac. 1017], and no further comment is deemed expedient. But if we could say that her story is inherently improbable we should, of course, have no hesitation in branding it as false and malicious and awarding appellant the relief he seeks.

In support of his contention that her charge is incredible, appellant calls attention to the peculiar and unusual circumstances attending each occasion of immorality as related by the prosecutrix, and the improbability of the story is enhanced and emphasized, so it is claimed, by "the established good character of the defendant for decency and morality, prohibiting the belief that he did the monstrous and depraved things the prosecutrix in her destructively self-contradictory testimony says he perpetrated against her virtue. Surely the defendant's good character as a minister of Christianity established by thirty-three years of constant devotion to the maintenance and advocacy of religion and morality should be and is a powerful circumstance indicating the great improbability of the accusation that has been made against him at the sinister instigation of his enemies, by a woman who it must be conceded is not 'above suspicion and reproach.' Says a learned court: 'Character under all circumstances is the best earthly inheritance. It is a shield to the innocent when unjustly accused.' (*United States v. Emerson*, 6 McLean, 406, [Fed. Cas. 15,051].)" The considerations, thus forcibly set forth, are of great significance and potency, but we need not dwell upon them at length. As to the peculiar circumstances of the various delinquencies we may say they do not stamp the recital of the prosecutrix with inherent improbability, but they furnish the basis for a persuasive

argument against the truth of her statements, and, no doubt, this feature of the case was conscientiously considered by the jury. It does, indeed, seem strange and almost incredible that any man in his senses would commit such an offense under such circumstances, but we cannot say that it is so unbelievable that the jury had no legal right to accept the story told by the prosecutrix. (*People v. Moore*, 155 Cal. 237, 241, [100 Pac. 688].) The profession to which he belonged was a circumstance, also vastly in favor of appellant's innocence. No higher calling ever enlisted the services of mankind, and it must be said that nearly all who are engaged in this great work are worthy of the respect and confidence of all upright people, but they are subjected to peculiar temptations along the line of this regnant impulse, and occasionally one falls and some of them, of course, are "wolves in sheep's clothing." We need hardly say that there are many historical examples of similar and other crimes committed by persons of high standing in the community under circumstances more strange and startling than are revealed in the case before us. It is especially true of this character of offenses. It is the old story, as old as the history of the race —of man yielding to the almost irresistible coercion of the strongest instinct of animal life. Indeed, we have the authority of Paul, the greatest preacher that ever lived, that there is a constant strife between the carnal and the spiritual forces for supremacy in man's nature, and he himself found it necessary to be constantly on his guard lest he become a castaway. Cases equally as strange have come under the observation of all of us and many of them could be readily recalled.

Of course, this might have been an unjust conviction. Mr. Slaughter may have been the victim of a foul conspiracy. If so, a monstrous wrong has been committed, but we are not in a position so to determine or so to declare. The responsibility of passing upon such considerations is not lodged with us. Finding, as we do, sufficient evidence to support the verdict and an absence of prejudicial error in the record, and having no means of determining that there was a miscarriage of justice, we can do nothing else than affirm the judgment; for it is not true, as contended by appellant, that under amendment 4 $\frac{1}{2}$ of article VI of the state constitution we are authorized to weigh the evidence and judge of the credibility

of the witnesses and thus virtually try the case anew. That amendment has been the subject of frequent exposition and we need not add to the discussion. However, we may say that in view of the record it is impossible for us to be "satisfied" that an injustice was done to the defendant. We cannot say, as declared by appellant, that the verdict was the result of "the impassionate clamor of the mob, of the intemperate indignation of the multitude," or that it was influenced by "the mad assaults of a sensational and hysterical public press," but we are required to hold, rather, that it was the conscientious judgment of a jury anxious to do right and to vindicate the law, like "the true judicial opinion" of which appellant speaks, resembling "the magnificent nobility of the great ocean in its mighty grandeur; calm and dispassionate in rest, eternal in power." It is true that the law "condemns with intransigent denunciation, a verdict or decision that is induced by passion or prejudice and exacts from the courts a stringent supervision, as well as a liberal exertion of remedial power to redress a grave wrong destructive of justice and the supremacy of the law." But the mandate is equally insistent that the courts content themselves with the exercise of the power committed to their hands by the constitution and the statutes, and that they refrain from an unwarranted interference with the prerogatives and duties assigned to other agencies by the deliberate action of the sovereign power of the state.

The judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 2, 1917, and the following cases cited: See *People v. Davis*, 147 Cal. 346, [81 Pac. 718]; *Burke v. Maze*, 10 Cal. App. 206, 211, [101 Pac. 438, 440].

[Civ. No. 2044. First Appellate District.—April 5, 1917.]

MILTON F. GABBS, Respondent, v. R. H. COUNTRYMAN
et al., Appellants.

MORTGAGE—FORECLOSURE—CONSIDERATION—CANCELLATION OF PREVIOUS NOTE—SURRENDER OF PLEDGED STOCK.—In an action for the foreclosure of a mortgage given to secure the payment of a promissory note, a finding against the defendant on the issue of want of consideration for the execution of the note and mortgage is supported by evidence of the return to the defendant by the plaintiff of a previous note upon its maturity without payment, together with certain corporate stock pledged as security for its payment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. A. E. Graupner, Judge.

The facts are stated in the opinion of the court.

Walter M. Willett, and R. H. Countryman, for Appellants.

Chickering & Gregory, for Respondent.

THE COURT.—This is a suit to foreclose a mortgage given to secure a promissory note executed by the defendants. Foreclosure was ordered against the mortgaged property, and defendants appeal from the judgment and from an order denying their motion for a new trial.

There is no merit in the first point that the case was improperly or irregularly transferred from the department of the superior court to which it was originally assigned to the department of the court in which it was heard and determined.

Equally without force—savoring even of frivolity—are the objections to the rulings of the court on the admission and rejection of evidence.

The defendants in their answer and cross-complaint pleaded that there was no consideration for the execution of the note and mortgage; and they now contend that the finding of the trial court against them on that issue is not sustained by the evidence. This position is not well taken. The record shows that the plaintiff gave to the defendant, R. H. Countryman,

the sum of thirteen thousand dollars in consideration for a certain interest in the rentals of two buildings—the Delbert Block and Countryman Building—to be erected on the west side of Van Ness Avenue in San Francisco shortly after the fire in April, 1906. Thereafter plaintiff became dissatisfied with the investment, and sold his interest in said rentals or buildings to said defendant, taking in exchange therefor the latter's promissory note for \$14,072.50, secured by a pledge of forty-two shares of the capital stock of the R. L. Radke Company. The note matured March 26, 1909; nothing was paid upon it, and thereupon the note and the stock pledged as security for its payment were returned to Countryman, and the note and mortgage in suit were executed and delivered to the plaintiff. The consideration, therefore, for this note and mortgage, it is obvious, was the cancellation of the previous note and the return of the pledge, and the consideration for the first note was the relinquishment by plaintiff of any interest in the buildings, and the consideration for his interest in the buildings was the payment by him of the sum of thirteen thousand dollars in cash to Countryman for such interest.

The judgment and order are affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 4, 1917.

[Civ. No. 2214. Second Appellate District.—April 5, 1917.]

L. W. BLINN LUMBER COMPANY (a Corporation), Appellant, v. ALICE B. COHN et al., Respondents.

BUILDING CONTRACT—INCOMPLETELY INITIALED AND UNATTACHED SPECIFICATIONS—VOID CONTRACT.—A building contract reciting that the work should be done and performed conformably to the drawings and specifications of certain architects to be filed with the contract and identified by the signatures of the respective parties thereto, is wholly void, where the specifications consisting of three sets were not attached to the contract nor to each other when insufficiently initialed, or subsequently examined or further initialed after they were fastened together and filed for record by some person other than and in the absence of the contractor.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge.

The facts are stated in the opinion of the court.

E. S. Williams, for Appellant.

W. O. Morton, Harry A. Hollzer, and C. B. Morton, for Respondents.

CONREY, P. J.—On December 5, 1910, the defendant Alice B. Cohn, as owner, and defendant John Rebman, as contractor, signed a document purporting to be a contract for the construction of an apartment building and garage on land of Mrs. Cohn in the city of Los Angeles. The writing provided that the whole of the work to be performed thereunder should be completed by the first day of April, 1911. This was not done, and on the twelfth day of September, 1911, the buildings were not yet completely constructed. The owner took possession and proceeded to complete them, and they were fully and actually completed on the thirtieth day of October, 1911. Pursuant to a contract made with Rebman, the plaintiff furnished lumber to be used and which was used in the construction of those buildings, and on account thereof there became due to the plaintiff the sum of \$9,180.61, balance unpaid of the value of the materials thus furnished. The court granted judgment against Rebman for that sum, with interest thereon at seven per cent per annum from October 3, 1911, together with \$1.90 for cost of verifying and recording its claim of lien, and its costs of suit herein. Plaintiff's claim of lien enforceable against the owner's property was allowed in the sum of only \$5,962.65, with costs. The plaintiff has appealed from that part of the judgment which thus limits the extent of its lien.

Appellant claims that the building contract between Mrs. Cohn and Rebman was invalid because it was not in writing as required by law, and that therefore the plaintiff was entitled to have a lien for the full value of the materials furnished by it. The contract, after describing the work to be done, provided as follows: "All of which work shall be done and performed conformable to the drawings and specifications by Messrs. Neher and Skilling, architects, and signed

by the parties hereto, which are intended to be filed herewith in the office of the county recorder of said Los Angeles county, and which are identified by the signatures of the respective parties hereto." On December 10, 1910, that document was filed in the recorder's office of Los Angeles County, and at the same time there were filed with it three sets of specifications: (1) General specifications referring to the construction of the apartment building in general, but not including any reference to electric wiring or to any garage; (2) specifications for electric wiring; (3) specifications for garage. The general specifications bore the initials of John Rebman, placed by him on each sheet thereof. They did not have the signature of Mrs. Cohn, except that she wrote her initials, A. B. C., on page 5 thereof. The same initials, A. B. C., were placed on the other sheets of the general specifications by one A. B. Cohn, not the owner Alice B. Cohn, without authority from her and not in her presence. The electric wiring specifications and the garage specifications were neither signed nor initialed by the owner nor by Rebman, but the initials A. B. C. had been placed thereon by the said A. B. Cohn acting under no authority from Alice B. Cohn. At the time when the several specifications were initialed as above stated, they were not attached to the signed contract nor to each other. Afterward they were fastened together, and filed for record by some person other than and in the absence of John Rebman. Rebman did not sign or initial the specifications, except as above stated, and he never examined the same before they were recorded or after they were fastened together or after he signed and initialed the same as above stated.

Under decisions heretofore made and which fully state the rule and its reasons, it must be held that the purported contract is "wholly void" and the contention of the plaintiff must be sustained. (*Donnelly v. Adams*, 115 Cal. 129, [46 Pac. 916]; *Donnelly v. Adams*, 127 Cal. 24, [59 Pac. 208]; *West Coast Lumber Co. v. Knapp*, 122 Cal. 79, [54 Pac. 533]; *San Francisco Lumber Co. v. O'Neil*, 120 Cal. 455, [52 Pac. 728]; *Howe v. Schmidt*, 151 Cal. 436, [90 Pac. 1056]; *Hartwell v. C. Ganahl Lumber Co.*, 8 Cal. App. 733, [97 Pac. 901].) Respondents also rely upon *Hartwell v. C. Ganahl Lumber Co.*, *supra*, and claim that the facts of this case are substantially like that case in which the validity of the con-

tract was sustained. But the analogy does not hold. In that case the court upon the evidence before it held it as a presumption that the contract was signed by the owner and contractor in the condition in which it came to the court, to wit, with the plans and specifications attached thereto, and there was oral evidence that it was so signed. In that case also the specifications contained a statement describing them as specifications relating to a building to be erected for the named owner, together with a description of the lot on which the building was to be constructed. In the case at bar the findings of the court declare, as above stated, that the specifications and contract were not together when the contract was signed. It further appears that the electric wiring and garage specifications, although they contain the name of the owner and the names of the architects, do not contain any reference to the location of the land upon which the work was to be done.

Respondents endeavor to avoid an adverse decision upon this branch of the case by suggesting that at the trial it was stipulated that the contract was in the form required by the lien law and recorded prior to commencement of the work as required thereby, including the specifications and plans attached. It is true that such stipulation was made at the opening of the trial. The complaint at that time consisted of two counts neither of which attacked the validity of the contract. The stipulation, therefore, evidently was made in order to place before the court facts about which there was no controversy, but which were necessary in order to present in connection therewith the facts about which controversy then existed. At a later time in the trial the plaintiff was allowed to amend its complaint by adding thereto a statement of the facts to which we have referred, and on account of which the plaintiff sought to attack the validity of the contract. Since nothing appears to the contrary, we must assume that the further conduct of the trial under the amended pleadings, and the actual receiving and considering of evidence upon the new issues thus framed, was understood by the parties and by the court as having set aside the above-mentioned stipulation, and that the court was no longer bound thereby. Indeed, the bill of exceptions states that "thereupon it was agreed that the court should first hear and dispose of the issue of the invalidity of the contract."

The other principal ground of appeal presented by counsel for plaintiff assumes the validity of the building contract. In view of our decision against the validity of that contract, it becomes unnecessary to pass upon other questions.

That portion of the judgment from which the plaintiff L. W. Blinn Lumber Company appealed is reversed, and the trial court is directed to amend its judgment so as to recognize and enforce the lien of the plaintiff as claimed by it for the full amount of the balance due to it, as shown by the findings of fact.

James, J., and Shaw, J., concurred.

[Civ. No. 2348. Second Appellate District.—April 6, 1917.]

FRANK POHLMANN, Petitioner, v. L. R. PATTY, as County Clerk of San Bernardino County, Respondent.

ELECTION LAW—DEFECTIVE AFFIDAVITS OF REGISTRATION—ACCEPTANCE BY CLERK—PART OF GREAT REGISTER—CANCELLATION UNAUTHORIZED.—Where in the preparation of an affidavit of registration for election purposes, the county clerk failed and neglected to enter in the affidavit the fact that the affiant could read the constitution in the English language, and could write his or her name, which in fact he could do, such officer, by receiving the affidavit and accepting it for registration purposes, and by holding it in his office together with the other affidavits of registration constituting the great register of the county, without objecting to its sufficiency when presented and received by him, thereby makes the same a part of the great register, and is without power to thereafter cancel the affidavit or to withhold the same from use in an election.

ID.—CANCELLATION OF REGISTRATIONS—CONSTRUCTION OF CODE.—Section 1106 of the Political Code, which sets forth the instances in which it is made the duty of the county clerk to cancel entries of registration of voters, does not include the cancellation of affidavits of registration on account of failure of the affidavits to contain answers to questions as to whether the person being registered could read the constitution in the English language or write his or her name, which, under section 1097 of such code, should have been answered in the affidavits, as the provisions of the latter section are directory and not mandatory.

APPLICATION for a Writ of Mandate originally made to the District Court of Appeal for the Second Appellate District.

The facts are stated in the opinion of the court.

Ralph E. Swing, and Frank T. Bates, for Petitioner.

THE COURT.—On petition of Frank Pohlmann an alternative writ was issued to L. R. Patty, as county clerk of the county of San Bernardino, requiring him to appear and show cause why a peremptory writ of mandate should not issue directing him to transmit, as part of the great register of the county of San Bernardino, certain affidavits of registration to the boards of election appointed to hold and conduct an election called to be held in the city of San Bernardino on the ninth day of April, 1917. Without any formal return the respondent appeared personally before this court and stated that he is ready and willing to submit to such order as the court shall make; it being understood that the decision will be made upon the facts alleged in the petition.

For more than thirty days prior to the ninth day of April, 1917, the petitioner and each of the other persons whose names are set forth in two certain exhibits attached to the petition, registered as qualified electors of the city of San Bernardino by subscribing and swearing to the affidavit of registration provided for that purpose by the respondent county clerk, and then and there answered each and every question asked of them. At the time of so registering each of said petitioners was a resident of the precinct from which he registered. At said time respondent failed and neglected, and has since failed and neglected, to enter in the affidavit of registration of each of the persons named in Exhibit "A," the fact that such person being registered could read the constitution in the English language and could write his or her name. In fact, each of said persons could read the constitution in the English language and could write his or her name. Respondent failed and neglected to enter in the affidavit of registration of each of said persons whose names appear in Exhibit "B" the number of the room and the floor or number of the room or floor occupied by said persons.

Prior to the filing of this petition, the petitioner demanded that the respondent make the omitted entries in each and all of such affidavits of registration, but respondent refused to make such entries or correct such affidavits of registration. The respondent contends that each of said registrations is void and illegal, and that it forms no part of the great register of said county, and threatens to take and remove each of said affidavits of registration from the great register of said county, and threatens to withhold said affidavits of registration, and not send or transmit the same or any of them to the boards of election appointed to conduct an election to be held in the city of San Bernardino on the ninth day of April, 1917. The petitioner maintains this proceeding for and on behalf of himself and the numerous persons whose names appear in said exhibits.

The affidavits in question showed all the qualifications of the electors as required by sections 1096 and 1097 of the Political Code, except as above stated. They have been regularly received and are in the hands of the clerk as affidavits of registration made by qualified electors. It is not contended that any reason exists why they should not be transmitted to the boards of election of the several precincts, except on account of those formal defects.

It is our opinion that by receiving said affidavits of registration and accepting them for registration purposes at the times when presented and holding them in his office, together with the other affidavits of registration constituting the great register of San Bernardino County, without objecting to their sufficiency at the time when they were presented and when he received them, the county clerk made those certificates a part of the great register of said county. Having done so, he is without power to cancel those certificates or to withhold the same from use in the election to be held, and is without power thereby to deprive those registered voters of the right to vote at the election. Section 1106 of the Political Code sets forth the instances in which it is made the duty of the clerk to cancel entries of registration of voters. The instances there specified do not include the cancellation of an affidavit of registration on account of any defects of form, or on account of failure of the affidavits to contain answers to questions of the character hereinabove specified which, under the provisions of section 1097 of the Political Code, should have

been answered. The provisions of the statute affecting the matters in question are directory and not mandatory. We do not doubt that the clerk might refuse to receive a defective affidavit; and it might be his duty to so refuse. The law places in his hands the business of receiving affidavits of registration and making up the great register. In determining the sufficiency of the affidavits his acts are of a judicial nature, and before accepting them it is his duty to pass upon the certificates and see that they are sufficient in form. His acceptance of the certificates amounts to a judgment making them a part of the great register. Thereupon the qualified voter becomes entitled to have his name upon the great register, and the clerk is not vested with authority to thereafter remove it therefrom. If subsequently there should occur any facts of the description contained in section 1106 of the Political Code, that section states that the clerk must cancel the registration, or if any facts occur which result in a judgment of cancellation of a registration, it may be eliminated thereby as provided by section 1109 of the Political Code. In the absence of any of those conditions, the clerk may not interfere with the legal effect of any registration of a voter, and it is his duty to send the affidavits of registration to the boards of election as provided by law.

Referring to the complaint of petitioner that respondent has refused to alter the affidavits of registration referred to in the petition by supplying the omitted entries therein, we are of the opinion that the county clerk is without authority to change them after they have been accepted and have become a part of the great register. The statements contained in such affidavits are the evidence furnished by the voter upon which the clerk has acted in receiving the voter's name for registration.

It is ordered that a peremptory writ of mandate issue to the respondent, directing that he furnish and transmit to the boards of election appointed to hold and conduct said election in the city of San Bernardino, as part of the great register of said county, the affidavits of registration referred to in the petition.

[Civ. No. 1600. Third Appellate District.—April 6, 1917.]

R. PLATNAUER, Petitioner, v. SUPERIOR COURT OF SACRAMENTO COUNTY et al., Respondents.

COSTS—ANNULMENT OF JUDGMENT FOR CONTEMPT ON CERTIORARI—ALLOWANCE AGAINST JUDGE OR COUNTY UNAUTHORIZED.—Where a judgment for contempt of court is set aside on a *certiorari* proceeding, the petitioner is not entitled to have the costs incurred by him in the proceeding taxed against the judge nor allowed against the county, as such a proceeding is not the ordinary action to which sections 1027 and 1032 of the Code of Civil Procedure are applicable.

APPLICATION originally made to the District Court of Appeal for the Third Appellate District to strike out a memorandum of costs incurred in a contempt proceeding.

The facts are stated in the opinion of the court.

A. M. Seymour, J. S. Daly, and R. Platnauer, for Petitioner.

Meredith, Landis & Chester, for Respondents.

BURNETT, J.—A judgment was rendered by said superior court finding petitioner guilty of contempt and, upon petition to this court, said judgment was set aside upon the ground that the conduct of petitioner was not such as to justify said finding. (*Platnauer v. Superior Court of Sacramento County*, 32 Cal. App. 463, [163 Pac. 237].) Petitioner thereupon filed in this court a memorandum of his costs incurred in the above-entitled proceeding which respondent has moved the court to strike out “upon the ground that the decision and judgment of the court in said matter did not award costs to the petitioner, and upon the further ground that costs are not recoverable by petitioner in any event in said matter and are not authorized or allowed by law.”

Petitioner claims that he is entitled to his costs by virtue of sections 1027 and 1032 of the Code of Civil Procedure. The former provides: “The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, and in that event the matter of costs is within the discretion of the appellate court,” etc. Section 1032 is: “When the

decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case."

But this is not the ordinary action to which said sections of the code apply. It was directed against a court of record for the purpose of reviewing a judicial determination of that tribunal. In such cases the court is not liable for damages or for costs. The rule is stated in 23 Cyc. 567, as follows: "As a general rule no person is liable civilly for what he may do as a judge while acting within the limits of his jurisdiction, nor is he liable for neglect or refusal to act. The rule is especially true where the judge is one having general jurisdiction, and in such cases there is no liability even though he exceeds his authority. The overwhelming weight of authority is to the effect that where a judge has full jurisdiction of the subject matter and of the parties, whether his jurisdiction be a general or limited one, he is not liable civilly when he acts erroneously, illegally or irregularly and he is not chargeable with costs resulting from his erroneous rulings, or the cost of a proceeding to prohibit erroneous action on his part." It has even been held that he is not liable when he acts from malicious or corrupt motives. (23 Cyc. 569.) Here, it may be said, there is no contention nor evidence that the court acted from anything but proper motives. Nor is there any doubt that it had jurisdiction of petitioner and of the subject matter. It, however, acted erroneously in finding from the facts that a contempt had been committed. It is true that its judgment was annulled on *certiorari* for excess of jurisdiction, but, after all, it presented a case, in the opinion of this court, of reaching a wrong conclusion from the premises involved therein. However, petitioner admits that no cost can be allowed against the judge or the court, but he contends "that inasmuch as the statute is mandatory, and that he *must* be allowed his costs; and seeing that they have been incurred in connection with the maintenance of the superior court of Sacramento County, the same should be paid by the county, and that respondent should be directed to draw an order on the treasurer of Sacramento County for the amount." In support of this view he cites *State v.*

Whitaker, 45 La. Ann. 1299, [14 South. 66], *Haviland v. White*, 7 How. Pr. (N. Y.) 154, and *People v. Flake*, 14 How. Pr. (N. Y.) 527.

The first of these involved the violation of an ordinance of the city of New Orleans. The judge of the recorder's court refused to allow "a suspension appeal" and it was held that his course was totally unwarranted. As to the costs it was said by the supreme court: "Although the action of the city judge in the matter was unjustifiable, reasons of public policy protect him from being made to pay the costs. They must be borne by the city of New Orleans."

The point involved in *Haviland v. White*, 7 How. Pr. (N. Y.) 154, was whether the provision of the statute as to costs applied to *certiorari* proceedings. After "a good deal of consideration and considerable hesitation" the court reached the conclusion that it was a case for costs, but it is to be observed that there were adversary parties in the litigation, and the costs were awarded against the losing party.

The *Flake* case, *supra*, was similar to *State v. Whitaker*, *supra*. It was held that the referees or commissioners of highway acted as judges and constituted a court of inferior jurisdiction within the meaning of the code of New York. In speaking of the action of said commissioners in the matter it was said: "Their error is an error of judgment, at least in the view of this court, and no obliquity of motive is to be imputed to them. They should not, therefore, be charged with the costs of the appeal." It was further held that the appellants should not be charged with the costs, and the final conclusion of the court was announced in these words: "On the whole, I think the proper direction, under all the circumstances of the case, is that the costs of the relator in this court, as of an action at issue, or an issue of law, be awarded against and collected of the town of Westfield; and that the amount thereof be collected by a tax, as a part of the town charges of that town, in the next levy of taxes."

Thus it appears that two of these cases seem to afford some countenance to the contention of petitioner herein, but we can find no law in this state that authorizes us to make the order which petitioner seeks.

The county itself was not a party to the action. Besides, the superior court is an agency of the state rather than of the county. It is the superior court of the state of California

in and for the county of Sacramento. Again, it is difficult to understand how said costs were incurred "in connection with the maintenance of the superior court." But if we assume that petitioner has a claim against the county for his outlay he must in the first instance present it to the board of supervisors for allowance. If they reject it he can then maintain the proper action for its recovery. (Pol. Code, secs. 4075, 4078.)

As we are satisfied that no allowance of costs should be awarded in this proceeding, the motion to strike out is granted.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 4, 1917.

[Civ. No. 1625. Third Appellate District—April 12, 1917.]

ROEBLING CONSTRUCTION COMPANY (a Corporation), Respondent, v. DOE ESTATE COMPANY (a Corporation), Appellant.

BUILDING CONTRACT—COMPLIANCE WITH SPECIFICATIONS—DEFECTS IN CONSTRUCTION—RECOVERY BY CONTRACTOR.—Where in the performance of a contract for the doing of certain concrete work in connection with the construction of a building the contractor performed the work in strict compliance with the requisites of the specifications and obtained monthly certificates approving the work, he is entitled to recover the final payment notwithstanding the subsequent cracking of some of the flooring due to an improper mixture of gravel and cement and the refusal of the architect to issue his final certificate because of such defects.

Id.—RESULTS OF WORK—WHEN RISK UPON OWNER.—Where, in the erection of a building, the owner agrees to pay a certain sum for doing a certain part of the work and specifically provides the kind of materials to be used and the manner in which they are to be used, and stands by and directs and afterward approves the work, the risk of its serving the purpose intended by the owner is clearly upon him.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. L. T. Price, Judge presiding.

The facts are stated in the opinion of the court.

Campbell, Weaver, Shelton & Levy, for Appellant.

Frank M. Parcells, for Respondent.

CHIPMAN, P. J.—The action was brought to recover a balance of \$12,039.75 alleged to be due upon the contract price for concrete work performed on the Wiley B. Allen Building in San Francisco. The complaint sets forth *in haec verba* the contract upon which the action is based. Among its provisions are the following:

“FIRST: The contractor agrees, within the space of fifty (50) working days from and after the date of recording of this contract to have the foundations in shape to receive the cast iron bases and side-walk beams (Balance of work in 35 working days); to furnish the necessary labor and materials, including tools, implements and appliances, required, and perform and complete in a workmanlike manner all the trench, excavating reinforced concrete foundations, reinforced basement walls, basement floor, all floor and roof slabs, pent-houses, all girder and column concrete, fire-proofing, all concrete sidewalks, retaining walls, etc., and other works shown and described in and by, and in conformity with the plans, drawings and specifications for the same made by Havens & Toepke, the authorized Architect employed by the Owner, and which are signed by the parties hereto, one set of which is on file in the office of the City and County Recorder, and the other in the office of the Architect subject to inspection by parties interested.

“SECOND: Said Architect shall provide and furnish to the Contractor all details and working drawings necessary to properly delineate said plans and specifications; and the work is to be done and the materials furnished in accordance therewith under the direction and supervision and subject to the approval of said Architect, or a Superintendent selected and agreed upon by the parties hereto, within a fair and equitable

construction of the true intent and meaning of said plans and specifications. . . .

“**FIFTH:** The owner agrees, in consideration of the performance of this agreement by the contractor, to pay, or cause to be paid, to the Contractor, his legal representatives or assigns, the sum of Thirty-nine Thousand Five Hundred Seventy-six dollars in United States Gold Coin, at times and in the manner following, to-wit: Seventy-five per cent of the amount of labor performed and materials erected at building and as estimated according to the whole contract price and payable on the first day of each month, commencing on the first day of August, 1908, and the balance to-wit: the sum of Nine Thousand Eight Hundred and Ninety-four dollars, thirty-five days after completion and acceptance by the Architects of this contract.

“**PROVIDED**, that when each payment or installment shall become due, and at the final completion of the work certificates in writing shall be obtained from the said Architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and the said Architect shall at said time deliver said certificates under his hand to the Contractor or, in lieu of such certificates, shall deliver to the Contractor in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied, to entitle the Contractor to the certificate or certificates. And in the event of the failure of the Architect to furnish and deliver said certificates or any of them, or in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the Contractor, the amount which may be claimed to be due by the Contractor, and stated in the said demand by him for the certificate, shall, at the expiration of said three days, become due and payable, and the Owner shall be liable and bound to pay the same on demand.

“In case the Architect delivers the writing aforesaid in lieu of the certificate, then a Compliance by the Contractor with the requirements of said writing shall entitle the Contractor to the Certificate. . . .

“**THIRTEENTH:** The payment of the progress-payments by the Owner shall not be construed as an absolute acceptance of the work up to the time of such payments; but the entire

work is to be subject to inspection and approval of the Architect or Superintendent at the time when it shall be claimed by the Contractor that the contract and works are completed; but the Architect or Superintendent shall exercise all reasonable diligence in the discovery and report to the Contractor, as the work progresses, of materials and labors which are not satisfactory to the Architect or Superintendent, so as to avoid unnecessary trouble and cost to the Contractor in making good defective parts. . . .

“All floor slabs in the third, fourth, fifth and sixth floors except in corridors and lavatories to be cemented over with a coat at least $\frac{3}{4}$ ” thick made of equal parts of fine, sharp, clean, screened gravel to equal parts of either Golden Gate or Standard cement as selected. Said cementing to be perfectly smooth and well troweled and to be perfectly level. . . .

“Before the concrete topping is placed on concrete floor slabs throughout third, fourth, fifth and sixth floors see that all concrete work is well cleaned off (broom cleaned) then well wet and dusted with cement, all to be done before the top coat of cement is applied.”

Paragraph 4 of the complaint was amended during the trial to read as follows:

“That each and every of the covenants and conditions in said agreement contained upon the part of said plaintiff to be by it kept and performed have been fully complied with, kept, and performed by it; and plaintiff further says that it did all the work in said contract mentioned, and duly performed on its part, in every respect, said work according to specifications and terms of the contract; that said work was fully performed, finished and completed by plaintiff on or about the 1st day of July, 1909. . . . That thereafter, to wit, on the 25th day of September, 1909, plaintiff demanded of defendant’s architects certificates in writing for the payments, in said contract mentioned and provided to be made unto plaintiff, then remaining unpaid, but plaintiff says said architects refused to deliver to plaintiff such certificates in writing for said payments, and ever since have refused and still refuse, to deliver the same unto plaintiff.

“That of the sum of Thirty-nine thousand five hundred seventy-six dollars, the amount by said defendant agreed to be paid to plaintiff for said work, as in said contract provided, no part thereof has been paid saving and excepting the sum

of twenty-seven thousand five hundred thirty-six and twenty-five hundredths dollars, so that plaintiff says, and charges the fact to be, that a balance of twelve thousand and thirty-nine and seventy-five hundredths dollars is due, owing and unpaid therein."

The answer set up the defense of nonperformance. A cross-complaint was also filed by defendant alleging damages: (1) Cost of linoleum laid down to minimize the damages; (2) Loss of rentals; (3) Estimated cost of completing the work required by the contract, amounting in all to \$19,753.20. As the decision of the court was against the defendant upon the issue of performance it necessarily disposed of the claim for damages. Says the brief of defendant: "If the decision thereon be upheld, the litigation will be concluded in all respects; if the court shall hold that the plaintiff did not perform, the matter will be at large and a new trial of all issues will be in order."

The controversy involves only the work done in the construction of the top cement finish upon the third, fourth, fifth, and sixth floors of the building. The court made the following findings:

"III. As to the allegations contained in amended paragraph IV of said complaint, and the denials of said allegations contained in paragraph V of the defendant's answer herein, the court finds that plaintiff fully performed all of the covenants and conditions of said contract, and the modification thereof set forth in paragraph III as amended, upon its part to be kept and performed, and did all the work in said contract mentioned, and did fully perform on its part, in every respect, said work according to the specifications and terms of the contract; and did fully perform, finish and complete said work in compliance with all of the conditions, and in accordance with the plans and specifications, of said contract on the 1st day of July, 1909.

"As to said allegations and denials, the court further finds that the construction and installation of the top cement finish upon the third, fourth, fifth and sixth floors of the building in which the work was contracted to be done and performed was completed by plaintiff on or about the 29th day of March, 1909, in accordance with the specifications and conditions of said contract, in a good and workmanlike manner, and when completed, as aforesaid, said top cement finish was well trow-

eled, perfectly smooth and perfectly level; that on said date said top cement finish was in a wet and soft condition; well troweled, perfectly smooth and perfectly level, and thereupon plaintiff covered said top cement finish of said floors with sand, in order to facilitate the drying and hardening of said top cement finish upon said floors; that on the 5th day of May, 1909, said sand was removed, whereupon it was discovered that in the interim said top cement finish had become dry and had become hardened, and was on said date found to be cracking, checking and loosening from the slab or rough concrete upon which said top cement finish had been applied; that thereafter said top cement finish of said floors continued to crack and check and become loosened from said slab or rough concrete, and said cracking, checking and loosening increased steadily until approximately fifty per cent of said top cement finish of said floors had been cracked, checked or loosened from said slab or rough concrete; that said condition of said floors continued up to the date of the trial of this action.

"That said contract expressly provides that the architect for the owners of said building shall provide and furnish to the contractor all details and working drawings necessary to properly delineate said plans and specifications, and that the work shall be done and the materials furnished in accordance therewith, under the direction and supervision, and subject to the approval of, said architect, or a superintendent selected and agreed upon by the parties thereto; and the court here finds that the materials used by plaintiff in the construction of the top cement finish of the third, fourth, fifth and sixth floors of said building were inspected and approved by the architect for said building, or his authorized representatives; and that said materials were mixed in the proportions specified by the contract, and that the work of laying or installing the same upon said floors was all done and performed by plaintiff under the inspection, direction and supervision of said architect, or his authorized representative, and approved by him, from the commencement of the laying of said top cement finish until its completion, on or about the said 29th day of March, 1909; that the cracked, checked, and loosened condition of said top cement finish was not discovered by, or known to, either plaintiff or defendant until the sand was removed therefrom, on or about the 5th day of May, 1909;

that said condition of said top cement finish was and constituted the first intimation received by defendant as to the ultimate condition of said floors."

Upon the matters set up in defendant's cross-complaint and the answer thereto the court made the following findings:

"As to the allegations set forth in paragraph XII of plaintiff's answer to the first count of the cross-complaint herein, the court finds that on or about the 29th day of March, 1909, the plaintiff and cross-defendant herein had fully performed and completed that portion of the work stipulated to be done by it under its said contract with said cross-complainant, comprising the cement topping of the third, fourth, fifth and sixth floors of said building, leaving the same perfectly smooth, well troweled and perfectly level, and that, in performing said work, cross-defendant fully complied with the requirements of said contract, which specified that the floor slabs on said floors should be cemented over with a coat at least $\frac{3}{4}$ of an inch thick, made of equal parts of fine, sharp, clean, screened gravel to equal parts of either Golden Gate or Standard cement, as selected; that thereafter, to wit, on or about the 5th day of May, 1909, said cement topping or surface on said floors was discovered by said cross-complainant and said cross-defendant to have cracked and checked in several places on each of said floors, whereupon and thereafter, and at various times during the months of May, June, July and August, 1909, cross-defendant removed the cracked portions of said cement topping and replaced the same with the materials and in the proportions and in the manner as required by the specifications aforesaid, each and every time leaving the cement topping so removed perfectly smooth, well troweled and perfectly level; that the checked and cracked condition of said floors was in nowise caused by any act or thing done, or any act or thing undone, by cross-defendant, or to any fault, lack of good workmanship or failure or refusal to comply with the specifications of said contract upon its part to be performed; that the cracking and checking of said cement topping upon said floors was caused by the improper mixture of gravel and cement, said gravel and cement having been mixed and laid down by plaintiff in the proportion of equal parts, being the proportion specified and required by the contract."

Plaintiff had judgment as prayed for, from which defendant appeals, as also from the order denying its motion for a new trial.

Appellant's contentions are: "I. The findings and the evidence both establish that the plaintiff did not perform the work required by the contract in that the top cement finish on four floors of the building was cracked and loose from the rough concrete. II. The complaint and the evidence both establish that the plaintiff did not obtain the acceptance nor the certificates of the architect which under the contract were the prerequisites of payment of the money sued for, but on the contrary that the architect refused to accept the work. There is no averment, finding or suggestion of proof that the architect's decision was impelled by fraud or resulted from mistake."

It is obvious from the findings that the trial court decided that plaintiff had fully performed its contract, in respect of these floors, by constructing them, as it had agreed to do, in accordance with the plans and specifications prepared by defendant's architects and written into the contract. Defendant's position is that if a possible way was open to plaintiff by which it could have produced a good floor it was its duty to do so, failing which the consequences must fall upon plaintiff; that, in short, it guaranteed a good floor unless it was impossible to build it by following the specifications.

Plaintiff's contract was to do certain concrete work in connection with the construction of a class A steel and concrete building being erected by defendant. The portion of the work which plaintiff was to do was specifically pointed out; the materials it was to use and the proportions of the ingredients of the concrete were specifically mentioned, and the manner in which plaintiff was to apply the mixture carefully provided for. The evidence was that plaintiff performed the work in strict compliance with the requisites of the specifications and, with the exception of the floors mentioned, the result was entirely satisfactory.

It appears that in constructing these floors plaintiff laid the concrete foundation, or built what are termed the "floor slabs," but did not put on the finishing coat until a month or six weeks later, plaintiff being engaged upon other parts of the work meanwhile. Before the finishing coating was laid on the slabs, the latter were cleaned and prepared as

directed by the specifications, the top coating was made "perfectly smooth and well troweled and perfectly level," as called for in the specifications. The surface was then covered with sand, an approved method of protecting the cement in the process of hardening or curing, and adhering to the slabs. Later, as found by the court, on the removal of this sand, cracks in the cement and failure to unite with the slabs in places were disclosed. All this work at its various stages was done under the personal inspection of the architect or his representative, and, as the court found, with his approval. The court found that plaintiff "laid the cement topping upon the third, fourth, fifth and sixth floors of said building in a good and workmanlike manner, and did fully perform and complete the work thereof in compliance with the conditions and in accordance with the plans and specifications of the contract." Plaintiff's attention having been called to the defective condition of the floors, it promptly expressed its willingness to remedy it and it made an attempt to do so by relaying the defective places in the top coating, in doing which it followed the requirements of the specifications for this work in every particular, but the mixture failed to unite with the slabs, the result being that about fifty per cent of the floors was in this defective condition when plaintiff completed his contract and had called for a certificate of final completion, which was refused. There was evidence tending to show that a better result might have been obtained had plaintiff put on the top finish contemporaneously with laying the slabs; that to have "scored" the top cement finish on the concrete slabs, or to have marked the floors off into "expansive joints," would also have been in accordance with good workmanship; that the cement finish might have been flooded with water and allowed thus to dry, or cure, and less shrinkage might have followed. These suggestions of experts were obtained upon defendant's theory that had there been any possible way to do the work which would have avoided what happened it was plaintiff's duty under the contract to adopt such way, regardless of the obligations imposed by the terms of the contract, and regardless of the duty put upon the architect in the matter of personally directing, instructing, inspecting, and supervising the work. Scoring was not mentioned in the specifications. The architect testified: "Q. As a matter of fact, you personally directed them to omit the

scoring? A. They asked me how I would like to have the floors scored. I said 'no,' make the floors smooth and level.' Nothing was said in the specifications about getting the top finish on simultaneously with the fabrication of the slabs. The specifications read: ". . . Before the concrete topping is placed on concrete floor slabs throughout third, fourth, fifth and sixth floors see that all concrete work is well cleaned off (broom-cleaned) then well wet and dusted with cement; all to be done before the top coat of cement is applied." These directions were faithfully followed. They show clearly, however, that the laying on of the top finish contemporaneously with the construction of the slabs as the work progressed was not contemplated. The witnesses generally agreed that to have laid the top coating contemporaneously with the other work on the floors would have been the best practice, though some of them thought it impracticable and much more expensive than the course taken. Architect Toepke testified: "Q. Then in your opinion, it would make no difference whether the cement coating was laid simultaneously with the concrete slab, or some time afterwards? A. Well, I do not see that there would be but very little difference"; and this may account for the absence of any such requirement in the specifications or any directions other than therein expressed. The contract expressly provided that all work shall be done "in accordance with the plans and specifications prepared by Havens & Toepke, architects, and under their direction, supervision and control"; and "material delivered or work erected not in accordance with the plans and these specifications must be removed at the contractor's expense and replaced with other material or work satisfactory to the architects," but it was also provided that the architects "shall exercise all reasonable diligence in the discovery and report to the contractor, as the work progresses, of materials and labors which are not satisfactory to the architect or superintendent, so as to avoid unnecessary trouble and cost to the contractor in making good defective parts." The delay in putting on the top finish was known to the architects, and if it was likely to affect the work injuriously, the architects in fairness should have called attention to it. They made no objection but supervised the putting on of the top finish and approved the work. Furthermore, the work on the four floors was finished on February 26, 1909, "with the exception of an opening of a brick-

mason's hoist," estimated to cost \$120, and, on March 1, 1909, a statement of the condition of the work at that time was presented to defendant, a bill made out and demand made for payment and the record shows that payment was made on the architects' certificate that this particular work of laying the top cement finish was completed with the exception of a small amount of trowel finish about the elevator opening, amounting to \$120. And the court found that all the floor work, including the top finish, was completed on or about March 29, 1909, "under the direction, inspection and supervision of said architect, or his authorized representative, and approved by him, from the commencement of the laying of said top cement finish until its completion." Except as to this small bit of work, noted in the statement, the architects' certificate was in effect a certificate of the completion of the work on these four floors on March 1st. It is urged by defendant against this conclusion that the architects could not at that time (March 1, 1909) have known what subsequently developed, and hence could not have intended to certify to the completion of the work. But they knew as much as plaintiff knew, and they knew that plaintiff was doing the work, and in fact did the work precisely as it had agreed to do it and, unless it can be held that plaintiff guaranteed the work to result in a perfect floor, it seems to us that defendant ought not to be permitted now to go behind the certificate of its agents chosen by it to pass upon this very matter. We cannot say that the contract imported such guarantee. It seems to us that when the plaintiff agreed "to furnish the necessary labor and materials, including tools, implements and appliances, required, and perform and complete in a workmanlike manner . . . all floor and roof slabs . . . and other works shown and described," etc., its engagement was to do this, as the contract specifically provides, "in conformity with the plans, drawings and specifications for the same made by Havens and Toepke, the authorized architects employed by the owner . . ." and "under the direction and supervision and subject to the approval of said architects." This interpretation, we think, is, as the contract provides, "within a fair and equitable construction of the true intent and meaning of said plans and specifications." Where, in the erection of a building, the owner agrees to pay a certain sum for doing a certain part of the work, and specifically provides the kind of

materials to be used, and the manner in which they are to be used and stands by and directs and afterward approves the work, the risk of its serving the purpose intended by the owner is clearly upon him.

Appellant cites English and American cases in which the contractor was held to have guaranteed good results in the absence of an express warranty to that effect, although counsel say: "In some cases a contrary conclusion has been reached where the plans and specifications are furnished by the owner and the builder merely agrees to perform the labor and furnish the materials specified." We do not feel called upon to give particular attention to the cases cited in which we think the rule enunciated will be found to rest largely either upon the terms of the contract, or upon the character of the work to be done. The rule applicable here, we think, will be found in *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228, [52 Pac. 496], and *Mannix v. Tryon*, 152 Cal. 31, [91 Pac. 983]. And the distinction made in these cases is pointed out in *Bryson v. McCone*, 121 Cal. 153, [53 Pac. 637], where it was held that defendant undertook not only to make the plant according to specifications, but also guaranteed that it would do certain work. In *Mannix v. Tryon* it was said: "He [the plaintiff] did not agree generally to plaster the dwelling, which would leave to him the selection of the materials and the method of doing the work. His agreement was to do it in a way that the owner and the original contractor had designed; according to the specifications which they had agreed on. He had no discretion in the matter. When he followed strictly those specifications, used exactly the materials they called for in the composition of the mortar and hard finish, and applied them in a workmanlike manner, he did all his contract called for. He did not contract for results, but only to do the work in a specified way." *Jones & Laughlin Steel Co. v. Abner Doble Co.*, 162 Cal. 497, [123 Pac. 290], is a case where it was contended that the contractor warranted that the floors of the warehouse, being constructed in part with materials furnished by plaintiff, would bear certain weights. Speaking of the defendant the court said: "The inference is that it could and would judge for itself as to the sizes of beams required. It had a competent and experienced architect in its employ. There is nothing necessarily showing that the de-

fendant was not, or did not consider itself, competent to determine the matter, or that it relied on plaintiff's advice or suggestions regarding it; or that plaintiff offered or undertook to give such advice."

We have not referred to the evidence and the findings as to the cause of the cracking and checking of the top dressing. The court found, and there was evidence to support the finding, that it "was caused by the improper mixture of gravel and cement, said gravel and cement having been mixed and laid down by plaintiff in the proportion of equal parts, being the proportion specified and required by the contract." We cannot see that it was essential to the finding of the court that plaintiff had fully performed its contract, to make a finding as to the improper proportions of sand and cement in the mixture required by the specifications, as the cause of the defects in the floors. If, as we hold, plaintiff contracted only to furnish the materials and do the work in compliance with the plans and specifications and in good and workman-like manner, the cause of the defects would be immaterial. Whatever the materiality of the finding may be, if any, its tendency is to fix the responsibility upon defendant by whose direction this improper mixture was used.

It appeared that the last progress payment was made by defendant in pursuance of the last certificate issued by the architect, April 7, 1909. The bill, dated April 1, 1909, states on the debit side the total due under the contract at that date, less twenty-five per cent. Then follow payments as credits and dates of payment, including the March payment, leaving a balance, \$836.25, for which a certificate was given. The final bill rendered is dated June 23, 1909, in like form, for the whole contract price less the credits from the beginning to the April 1st bill, inclusive, and less the twenty-five per cent reserved under the contract. During the ensuing months plaintiff endeavored to remedy the defects in the floors, keeping itself strictly within the specifications, but met with the same difficulty encountered in first laying them. On September 24, 1909, plaintiff made written demand on the architects for certificate of acceptance and final payment and, on September 27, 1909, the architects replied, stating "that a certificate of acceptance will not be issued for the reason that the cement topping of the 3d, 4th, 5th, and 6th floors is not in compliance with the specifications, it being loose in several

places and badly cracked and will not be acceptable to owner in its present condition."

It appeared that, beginning on September 1, 1908, and continuing monthly on the first of each succeeding month to April 1, 1909, inclusive, architects' certificates were issued and payments promptly paid thereon, and up to this time no question arose as to materials or workmanship. The top dressing of these floors was substantially completed in February, with the exception of the little work already pointed out costing \$120, and this remaining work was done in March and carried into the bill of April 1st, which was paid on the architects' certificates.

Plaintiff relies and, it seems to us, with justifiable confidence, upon the case of *City Street Improvement Co. v. City of Marysville*, 155 Cal. 419, [23 L. R. A. (N. S.) 317, 101 Pac. 308]. It is true that in that case there was a final certificate of completion, and this is urged as one of the grounds for distinguishing the two cases. It seems to us that so far as the work in question is concerned the March certificate, while perhaps not an acceptance, was a certificate of the completion of the work in accordance with the plans and specifications, and the court found that this work had been fully performed and completed on March 29th.

The rule is well established, as stated in *Coplew v. Durand*, 153 Cal. 278, 279, [16 L. R. A. (N. S.) 791, 95 Pac. 38]: "Where work is to be done to the satisfaction of a person, evidenced by a certificate to that effect, the production of such a certificate is a condition precedent to a right of action upon the contract." (*City Street Improvement Co. v. Marysville*, *supra*; *California Sugar etc. Agency v. Penoyar*, 167 Cal. 274, 279, [139 Pac. 671].) The court said, in *Coplew v. Durand*, *supra*: "The case which is thus presented is one where the work has been completed to the satisfaction of the owner and architect, and the latter thereafter and without warrant refuses to issue his certificate for the final payment. The refusal under these circumstances being unreasonable, the necessity for the production of the certificate is dispensed with."

It must not be overlooked that the only part of the work now or at any time in controversy was the top dressing of the floors. We have seen that the March certificate of completion covered this work and it was paid for on that certifi-

cate, so that it cannot be said the plaintiff was wholly without the architects' certificate. The refusal to issue the final certificate in September was based upon the claim "that the cement topping of the 3d, 4th, 5th, and 6th floors is not in compliance with the specifications." The evidence was and the court found that the work was done in conformity with the specifications in every particular, and at the time of its completion no question arose as to any feature of the work. On the contrary, it was declared by the architect Toepke to be satisfactory. The reason given for the refusal was not founded on the facts nor upon what we regard as the fair construction of the contract and can only be based upon the theory that plaintiff guaranteed a good floor, which was a matter not within the province of the architect to foreclose and make the ground of his refusal; neither is it a theory justly deducible from the provisions of the contract.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 12, 1917, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 11, 1917.

[Civ. No. 2021. First Appellate District.—April 14, 1917.]

K. KARAHADIAN, Respondent, v. PHILIP LOCKETT, Appellant.

VENDOR AND PURCHASER—CONTRACT FOR PURCHASE—FAVORABLE REPORT OF ATTORNEYS—CONSTRUCTION.—A clause in a contract for the purchase of real property calling for a favorable report from the attorneys for the purchaser is not to be construed to mean that the obligation of the purchaser was dependent upon a mere arbitrary, capricious, and whimsical rejection of the title.

ID.—BROKER'S COMMISSIONS—SALE OF REAL ESTATE.—A broker employed to sell real estate is entitled to his commissions where the purchaser procured by him enters into a valid and enforceable contract to purchase, and the fact that the contract contains a clause making the purchase conditional upon the approval of the title by

the purchaser's attorneys does not have the effect of making the contract merely an agreement for an option to purchase rather than a completed contract of purchase and sale.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Everts & Ewing, for Appellant.

John Shishmanian, Barbour & Cashin, and D. A. Cashin, for Respondent.

LENNON, P. J.—The plaintiff in this action was employed and authorized by the defendant "to sell" certain real property belonging to the defendant, and "to receive any deposit" which might be paid on account of the purchase price. Thereafter the plaintiff, as the agent of the defendant, entered into a written contract with parties known as "Kludgian brothers" to purchase the defendant's property for the sum of fourteen thousand dollars, but upon terms slightly different from those originally proposed and authorized by the defendant. The defendant, however, in writing ratified the contract thus made by the plaintiff, and accepted from him the sum of two hundred dollars which, simultaneously with the execution of the contract, had been paid to plaintiff by the intending purchaser on account of the purchase price. In addition to containing all of the essentials of a valid and enforceable contract of purchase and sale, the contract in question provided that "upon a favorable report of the attorneys" for the purchaser concerning the title to the property, the parties thereto would enter into an agreement for the purchase of the property "upon the terms and conditions therein mentioned." Subsequently the attorney for the purchasers rejected the title to the property for alleged defects, which it is admitted did not exist, or if existing could have been readily cured. Ultimately the purchaser refused upon demand to perform his contract, and declined the defendant's tender of a deed to the property. The defendant had agreed to pay the plaintiff five per cent of the purchase price in the event of a sale. Upon substantially these facts the case was

tried in the court below and judgment rendered for plaintiff in the sum of seven hundred dollars, upon a finding to the effect that the plaintiff had procured a purchaser for defendant's property who had entered into a valid and enforceable contract binding him to purchase. The evidence we think supports this finding.

The clause in the contract concerning the necessity for a favorable report upon the title to the property from the attorneys of the purchaser cannot be construed, as counsel for the defendant contends, to mean that the obligation of the purchaser was dependent upon a mere arbitrary, capricious, and whimsical rejection of the title to the property by his attorney. Obviously the clause in question did not have the effect of making the contract here involved merely an agreement for an option to purchase, rather than a completed contract of purchase and sale. The payment of the deposit of two hundred dollars on account of the purchase price was an acceptance of the terms and conditions of the contract (*Benson v. Shotwell*, 87 Cal. 49, [25 Pac. 249, 681]; *Easton v. Montgomery*, 90 Cal. 307, [25 Am. St. Rep. 123, 27 Pac. 280]); and while it savored to some extent of a preliminary contract which contemplated that it would be followed by another contract of purchase and sale, nevertheless inasmuch as it was mutually obligatory and contained in and of itself all of the essentials of a valid and enforceable contract, obviously the defendant, had he so desired, could have compelled the intending purchaser to perform, and therefore neither the latter's refusal to accept the deed tendered to him, nor his failure to enter into the second contract, could operate to defeat the plaintiff's right to recover his commission from the defendant.

The judgment and order appealed from are affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 11, 1917.

[Civ. No. 2217. Second Appellate District.—April 14, 1917.]

FAIRMONT CREAMERY COMPANY (a Corporation), Respondent, v. LOS ANGELES ICE & COLD STORAGE COMPANY (a Corporation), Appellant.

PLEDGE—CONSIGNMENT OF GOODS TO FACTOR—TRANSFER TO PURCHASERS—APPARENT OWNERSHIP OF PROPERTY.—Under section 2991 of the Civil Code, which provides that one who has allowed another to assume the apparent ownership of property for the purpose of making a transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value, a factor to whom is consigned a carload of eggs, receives the property for the purpose of making a transfer, notwithstanding that customers have been obtained therefor prior to the consignment.

ID.—PLEDGE OF CONSIGNMENT—EXAMINATION OF BILL OF LADING BY PLEDGEE—UNNECESSARY REQUIREMENT.—Where such a consignment is pledged by the factor as security for the repayment of a loan of money, it is not necessary in order to entitle the pledgee to hold the goods as against the real owner, that the pledgee should have examined the bill of lading.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge.

The facts are stated in the opinion of the court.

Sidney J. Parsons, and Horace Wilson, for Appellant.

Henry K. Norton, and Wilbur Bassett, for Respondent.

CONREY, P. J.—Action for conversion. Judgment was rendered in favor of the plaintiff and the defendant has appealed from the judgment.

As shown by the evidence, it appears that on the seventeenth day of June, 1913, one Fred F. Lambourn was engaged in business at Los Angeles as a broker selling merchandise on behalf of consignors, and also as a dealer in merchandise on his own account. He had been in business for several years, and so continued until the fourth day of August, 1913, when he was adjudged bankrupt. The plaintiff was engaged in the produce business at Omaha, Nebraska, and had been doing business with Lambourn as broker since April, 1911.

On June 5, 1913, Lambourn telegraphed to plaintiff that he had sold a car of eggs. The telegram was as follows: "Sold car candled current receipts fifty-three and over small dealers eighteen cents track. Wire car number and when can ship." On June 7, 1913, the plaintiff shipped the carload of eggs thus ordered and made the consignment directly to and in the name of Lambourn. The car arrived at Los Angeles on June 17th.

When the merchandise was shipped from Omaha a bill of lading therefor, showing the shipment from plaintiff to Lambourn, was received by plaintiff from the railroad company and was mailed by the plaintiff to Lambourn. According to the testimony of plaintiff's sales manager, this was done that Lambourn "might obtain possession of the eggs for the purpose of making delivery to the various parties to whom he had made sale as our broker." At the same time the plaintiff forwarded, through the Omaha National Bank to that bank's correspondent in Los Angeles, a draft on Lambourn directing him to pay to the order of the Omaha National Bank the sum of \$2,160 "and charge to account of this company." The draft was not paid.

On June 17, 1913, Lambourn informed the superintendent of the defendant that he had a car of eggs and wanted a loan on it. The eggs were taken into possession of defendant and placed in its warehouse, and defendant issued to Lambourn a warehouse receipt therefor. Thereupon, and on the same day, the defendant loaned to Lambourn the sum of two thousand three hundred dollars, taking his note for that sum, together with an agreement pledging and depositing with the defendant said carload of eggs as collateral security for the payment of that or any other liability or liabilities of Lambourn to the defendant, "due or to become due or that may be hereafter contracted." At all times mentioned in this opinion Lambourn was indebted to the defendant in an aggregate amount much exceeding the value of the property claimed by the plaintiff in this action. The evidence does not show when this indebtedness, other than the two thousand three hundred dollar loan, was incurred, except that defendant had been making loans to Lambourn for about two years, and on August 4, 1913, he owed it ninety thousand dollars. In making that loan of June 17th the defendant made no special inquiry as to ownership of the merchandise, and

did not see or ask to see the bill of lading. It simply accepted Lambourn's statement that he had the car there and the fact that it was there.

The defendant did not at the time of making the loan and receiving the pledge, have any knowledge concerning the ownership of the property other than that it was in possession and control of Lambourn, as above stated. On September 10, 1913, the defendant sold said lot of eggs and received therefor the sum of \$2,880. On September 24, 1913, the plaintiff made written demand upon the defendant, stating therein that the plaintiff "is the sole owner" of said property stored with defendant in the name of Fred F. Lambourn, and demanded immediate delivery thereof and offered "to pay all reasonable charges upon said eggs upon delivery of same."

The first and principal question presented here arises under appellant's claim that the evidence is insufficient to support the finding that the plaintiff was the owner and entitled to the possession of the goods at and after the time of the transactions which took place between the defendant and Lambourn on the seventeenth day of June. Appellant relies upon certain sections of the Civil Code. "A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership." (Civ. Code, sec. 2369.) It appears that Lambourn was a factor within the definition stated in Civil Code, section 2026, which says: "A factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser." "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value." (Civ. Code, sec. 2991.)

Replying to the contention of appellant under these provisions of the statute, and especially under section 2991 of the Civil Code, counsel for respondent first argue that upon the facts shown Lambourn did not have apparent ownership of the property; that he did not receive the goods "for the pur-

pose of making any transfer," since the goods when shipped had already been sold and were consigned to Lambourn purely as a bailee to make delivery. We do not agree that his authority was thus limited. It may be that the property had been sold in the sense that there were purchasers to whom the goods were intended to be distributed by Lambourn, but there remained to be done by him the acts which would transfer the eggs to those purchasers. In the meantime they could not be identified as belonging to any purchaser, and the property remained in possession of Lambourn for the purpose of making those transfers.

Counsel for respondent further suggests the fact that the defendant did not inquire of Lambourn as to the form of the bill of lading, and never saw that document until the day of the trial. Therefore, they say that as to them Lambourn had mere possession, and that appellant cannot in any sense be said to be a pledgee who received the property in good faith in the ordinary course of business. We think that it was not necessary for appellant to examine the bill of lading. By acting upon the assumption that Lambourn had such bill of lading and without examining the same for itself, appellant took the risk that he might not have any such document in his possession. But since he did have it, the case is the same as if appellant had examined it and relied upon the evidence obtained by its own inspection.

Respondent's counsel refer us to *Akron Cereal Co. v. First National Bank*, 3 Cal. App. 198, [84 Pac. 778], where the provisions of section 2991 were considered. That case, like the case at bar, was an action for conversion of goods which had been forwarded to a point where they were to be sold or distributed. But the facts were essentially different from the present case, since, among other things, it appeared that the merchandise had been shipped by the plaintiff to its own order, and the terms of the bill of lading had not been such as to vest apparent ownership in the agent. The court there said that, in order that by reason of the pledge made to the defendant the plaintiff should be deprived of his right to the property, it was incumbent upon the defendant to show that the pledgor had been allowed by the plaintiff to assume the apparent ownership thereof for the purpose of making a transfer of it. "The pledgee must show the existence of these conditions as well as good faith on his part before he

can claim a title superior to that of the original owner." Referring to the person in possession who made the pledge of the property, it was said: "His apparent ownership of the property is limited by its source, and the rights of the defendant to the property as against the plaintiff are limited in the same manner." Admitting the full force of these principles, nevertheless we think that the defendant has shown that Lambourn's apparent ownership of the merchandise at the time when he attempted to pledge it to the defendant, was caused by the conduct of the plaintiff in consigning it to Lambourn for the purpose of transferring it to purchasers, and defendant is entitled to the protection given by section 2991 of the Civil Code.

The court determined that the value of the goods was \$3,120. The pledge was good as against the plaintiff's claim, for the amount of the debt created by the two thousand three hundred dollar loan, and for any additional advances made thereafter by the defendant to Lambourn. It was not, as against the plaintiff, valid as security for indebtedness existing prior to June 17, 1913, since as to such indebtedness it was not a pledge made "for value."

The judgment is reversed.

James, J., and Shaw, J., concurred.

[Civ. No. 2017. First Appellate District.—April 16, 1917.]

CASTRO POINT RAILWAY & TERMINAL COMPANY
(a Corporation), Respondent, v. ANGLO-PACIFIC DEVELOPMENT COMPANY (a Corporation), Appellant.

EMINENT DOMAIN—LANDS FOR RAILROAD USES—PUBLIC NECESSITY FOR TAKING—PROOF NOT REQUIRED.—In view of section 465 of the Civil Code, which expressly grants to railroad corporations the right to acquire lands by condemnation proceedings to be used in the construction and maintenance of their roads, and of section 1238 of the Code of Civil Procedure, which expressly provides that railroads are public uses in behalf of which the right of eminent domain may be exercised, the question as to whether there is a present public need for the construction and operation of the particular railroad seeking to exercise that right is no longer a judicial ques-

tion to be litigated in the condemnation proceeding, except to the extent that a private person whose lands are sought to be taken may put in issue the good faith of the railroad corporation in seeking to acquire his land for uses which are not public, but really to subserve some private interest or end.

APPEAL from a judgment of the Superior Court of Contra Costa County. R. H. Latimer, Judge.

The facts are stated in the opinion of the court.

Reed, Black, Nusbaumer & Bingaman, for Appellant.

McCutchen, Olney & Willard, for Respondent.

RICHARDS, J.—This is an appeal from a judgment in favor of plaintiff in an action for the condemnation of certain lands of the defendant in the city of Richmond for the use of the plaintiff as a railroad corporation. The cause was tried before the court without a jury. The evidence was not voluminous, and there is little, if any, dispute as to the facts of the case. The main and practically the only question involved is as to the sufficiency of the plaintiff's proof to warrant the trial court in denying the defendant's motion for a nonsuit and to justify its judgment of condemnation.

Upon the trial of the cause the plaintiff introduced in evidence a certified copy of its articles of incorporation, showing that it was a regularly organized railroad corporation, having for its object the construction of a railroad for the doing of a general freight and passenger business; and also presented in evidence the resolutions and maps of the corporation showing the proposed route of its railroad and the site and location of its terminals, and also showing the location of the lands of the defendant and others proposed to be taken. From these maps it appeared that the proposed railroad would be about two miles long, having its northern terminal in the hamlet of Winchaven, where it would connect with a railroad already there known as the Belt Line, and running around the easterly and northerly shores of the Richmond Peninsula, and that the plaintiff's proposed line would thence extend southerly along the shore line of the peninsula to deep water. There was then presented the testimony of the chief engineer of the plaintiff, who testified that he had made

surveys of the route and terminals of said railroad, and that the lands of the defendant sought to be condemned formed a part of said route and of one of said terminals, and were necessary for such uses, and that the work of constructing said railroad was in progress. With these proofs the plaintiff rested its case; whereupon the defendant moved for a nonsuit upon the ground that the plaintiff had offered no proof showing any public necessity for the existence of such a railroad, or for the taking of the lands in question. The court denied this motion, whereupon the defendant offered evidence tending to show that there were other lands which it was claimed were equally available for the uses to which the plaintiff proposed to put the land sought to be condemned, and also tending to show that there was no present public necessity for the building of said railroad growing out of an existing freight or passenger traffic needing to be served by it. The defendant also tendered some evidence showing that the incorporators of the railroad in question were also the principal owners of a rock quarry at or near its proposed northern terminal, and which would be chiefly benefited by the construction of the railroad. The court, however, rendered judgment in plaintiff's favor, whereupon the defendant prosecutes this appeal.

The sole question presented to the court upon this appeal is as to whether the plaintiff, in addition to the proofs above set forth, was required to show affirmatively that there existed a public necessity for the railroad for the uses of which the lands of the defendant were sought to be taken. The contention of the appellant is that when this issue is raised by the pleadings the burden is cast upon the plaintiff to make such affirmative showing as to the existence of a present public necessity for the railroad in question. On the other hand the respondent maintains that when the plaintiff has shown, as it did in this case, that it was a railroad corporation duly organized for the purpose of constructing and operating a railroad and conveying freight and passengers for hire, and that the land sought to be condemned was necessary for the uses for which it is sought, it has sufficiently established its right to the exercise of eminent domain in the taking of said lands for such uses under section 465 of the Civil Code and section 1238 of the Code of Civil Procedure.

We feel constrained to give our concurrence to the above contention on the part of the respondent herein from a consideration of the terms of the sections of the codes above cited, and from what appears to us to be the settled view of the courts of this state respecting the proofs required in cases of this character. Section 465 of the Civil Code in its enumeration of the powers of railroad corporations provides: "Every railroad corporation has power . . . 7. To purchase lands . . . to be used in the construction and maintenance of its road and all necessary appendages and adjuncts, or acquire them in the manner provided in title 7, part 3, Code of Civil Procedure, for the condemnation of lands." Section 1238 of the Code of Civil Procedure, under the title of "Eminent Domain," provides as follows: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: . . . 11. Railroads. . . ." Section 1241 of the Code of Civil Procedure, under the same title, contains the following provision: "Before property can be taken, it must appear (1) that the use to which it is to be applied is a use authorized by law; (2) That the taking is necessary for such use; provided, when the legislative body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by a vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence, (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor."

Section 1244 of the Code of Civil Procedure under the same title prescribes what the complaint in a condemnation suit must contain as follows: "The complaint must contain: (1) The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff. (2) The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants. (3) A statement of the right of the plaintiff. (4) If a right

of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding. (5) A description of each piece of land, or other property or interest in or to property, sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract or piece of property, or interest in or to property. . . . "

A comparison of these several sections of the code setting forth the right and the procedure in cases of eminent domain discloses that their only statement as to the cases wherein any proof or showing of a public necessity for the taking of property under the right of eminent domain designates cases where municipal corporations are seeking through their legislative bodies to acquire property for public uses; and that in such cases the resolution or ordinance of such legislative body shall be conclusive evidence of the public necessity of such proposed utility or improvement. In all other cases where private property is so sought to be taken by those entitled to exercise this right under section 1238 of the Code of Civil Procedure, all that is required to be shown is that the use for which the property is to be taken is a public use, and that the property is necessary for such use. By the express terms of section 1238 it is provided that railroads are public uses in behalf of which the right of eminent domain may be exercised; while section 465 of the Civil Code expressly grants to railroad corporations the right to acquire lands by condemnation to be used in the construction and maintenance of their roads. It would thus appear that there is no express requirement in the sections of our code which relate to the acquisition of lands for the use of railroad corporations through the exercise of eminent domain, and which define the procedure therefor, which would require these *quasi*-public corporations seeking to exercise that right to show affirmatively that there is an existing public necessity for the construction of the particular railroad for the uses of which such lands are sought to be taken.

In the early case of *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323, 324, it was held that when the legislature determines that railroad corporations were so far public in their nature as to be entitled to exercise the right of eminent domain, the necessity for the particular railroad seeking to exer-

cise that right was hereby established, and that the question as to whether there was a public need for such railroad was no longer a judicial question except in cases where the rights of private ownership were being invaded under pretense of an appropriation for a public use.

In the case of *City of Pasadena v. Stimson*, 91 Cal. 238, [27 Pac. 604], which was an action for the condemnation of lands for sewer purposes, it was held that when the legislature had defined sewerage to be one of the public uses for which private property may be taken, and when a city or town decides for itself, as it may do, that a sewer is desirable, it is not bound to prove that such sewer is necessary, but only that the taking of the property it seeks to condemn is necessary for the construction of the sewer: "when it shows that the use to which the property is to be applied is a public use (and this is shown by the statute in this case), the inquiry on that head is closed (Code Civ. Proc., sec. 1241)."

In the case of *San Francisco and San Joaquin Valley Ry. Co. v. Leviston*, 134 Cal. 412, [66 Pac. 473], the case of *City of Pasadena v. Stimson*, 91 Cal. 238, [27 Pac. 604], was cited as authority for the proposition that as to the necessity for the right of way, the existence of the public use and the location through the defendant's land established the necessity.

While the decisions of the courts of other jurisdictions are not uniform upon the subject, the effect of the foregoing cases would seem to be to settle the law in this state in favor of the view that when the legislature has declared that railroad corporations shall have the right to condemn lands of private persons for their uses, the question as to whether there is a present public need for the construction and operation of the particular railroad seeking to exercise that right is no longer a judicial question to be litigated in the condemnation proceeding, except to the extent that a private person whose lands are sought to be taken may put in issue the good faith of the railroad corporation in seeking to acquire his land for uses which are not public, but really to subserve some private interest or end; and such we understand to be the full extent and effect of the cases of *County of San Mateo v. Coburn*, 130 Cal. 631, [63 Pac. 78, 621], and of *Madera Ry. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, [87 Pac. 27]. In so far as this latter issue is presented in the case at bar it need only be said that, without reviewing it, the evidence sufficiently

justifies the findings of the lower court to the effect that the plaintiff is acting in good faith in seeking to construct, maintain, and operate its railroad, and that the same will be of benefit and use to the public; and that while it is true that the incorporators of the plaintiff are also directors and stockholders of certain corporations engaged in the operation of quarries which will be benefited by the building of such railroad, it was nevertheless not incorporated for the mere purpose of being of private benefit to those interested in said corporations, but was incorporated for the purpose of building and operating a railroad between certain termini, and that said railroad will be so situated when constructed as to be of benefit and use to the public. These findings of the trial court will not, under the settled rule, be disturbed upon appeal.

Judgment affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 14, 1917.

[Crim. No. 380. Third Appellate District.—April 16, 1917.]

THE PEOPLE, Respondent, *v.* THOMAS MASCHINI,
Appellant.

CRIMINAL LAW—APPEAL—FAILURE TO FILE BRIEF OR APPEAR—RIGHT OF PROSECUTION.—Where on a criminal appeal, the defendant fails to file any brief or to appear either by counsel or in person on the hearing of the appeal after notice to his counsel that the case had been placed on the calendar, the attorney-general has the right to submit the cause for determination upon the record.

APPEAL from a judgment of the Superior Court of Humboldt County, and from an order denying a new trial. Clifton H. Connick, Judge.

The facts are stated in the opinion of the court.

G. M. Pittman, for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

THE COURT.—The defendant was by information charged with and by a jury convicted of the crime of selling alcoholic liquors in supervisorial district No. 2, in Humboldt County, which is alleged to have been at the time of the commission of the act so charged “no-license territory,” it having been assigned to that category by the electors of said supervisorial district at an election held therein under the provisions of the so-called “Wyllie local option law” on the twenty-third day of April, 1912.

The appeals are from the judgment and the order denying him a new trial.

Although the record on appeal was filed on the seventeenth day of November, 1916, in the supreme court, to which the appeal had erroneously been taken, and the cause transferred to this court and the record filed here on the twenty-first day of November, 1916, the defendant failed to present and file a brief within the time required by the rule of this court, and none has since been filed or permission to file one asked for. The cause was placed upon the calendar of the regular April term of this court, beginning on the ninth day of April, 1917, and when so placed upon said calendar the attorney of record of the defendant was regularly notified of that fact. When the cause was called for hearing and argument, the defendant was not represented by counsel, nor did he appear in person to support his appeal, and no oral argument in his behalf was made. The attorney-general, in view of the situation thus presented, properly submitted the cause for determination upon the record. (*People v. Coates*, 32 Cal. App. 533, [163 Pac. 502]; *People v. Magri*, 32 Cal. App. 536, [163 Pac. 503].)

We have carefully examined the testimony, the rulings of the court upon the evidence, and the instructions. We have not discovered any prejudicial rulings admitting or rejecting testimony, and the charge to the jury contains a fair and correct statement of the principles of law pertinent to the issues.

It is not deemed necessary to reproduce herein, even synoptically, the testimony from which the jury reached their

conclusion that the accused was guilty as charged in the information. It is sufficient to say that we have, as stated, carefully read it, and thereby have been convinced that it fully supports the conclusion that, on the twentieth day of August, 1916, supervisorial district No. 2 of Humboldt County was dry or no-license territory; that the unincorporated town of Shively is situated within said "dry" unit; that the defendant kept a hotel in said town, and that on the day named he sold to one C. E. Gardner, an attaché of the office of district attorney of Humboldt County, in the presence and sight of one H. F. Kilker, another attaché of said office, a bottle of whisky, and received in payment therefor from said Gardner the sum of fifty cents.

The defendant positively denied selling any intoxicating liquor to Gardner, on the day named or at any other time, further testifying that what he did sell to him was soda water, and there was apparently some corroboration of that testimony. But manifestly the most that this court can say of that testimony is that its effect was only to produce a conflict in the evidence, which it was solely within the competence of the jury to resolve. And it was entirely with the jury to decide whether certain testimony offered by the defense in impeachment of the character of the witness Gardner for truth, veracity, and integrity was or was not sufficiently persuasive to accomplish its purpose.

The record presents to us no other alternative but to affirm the judgment and order, and it is so ordered.

[Crim. No. 475. Second Appellate District.—April 16, 1917.]

THE PEOPLE, Respondent, v. M. A. SCHMIDT, Appellant.

CRIMINAL LAW—QUASHING OF INDICTMENT—AMENDMENT OF CODE—AP-

PLICABILITY TO MOTION.—The amendment of 1911 to section 995 of the Penal Code which took away the defendant's right on motion to set aside an indictment to urge any objection to grand jurors which would be good on challenge to the trial jury, either as to the panel or an individual juror, related to procedure, and its applicability to a motion made to quash an indictment filed after the amendment became effective accusing a defendant with the com-

mission of a crime prior to the amendment does not deprive the defendant of any of his substantial rights.

ID.—EX POST FACTO LAW—TIME.—The time important to be taken into consideration in determining whether a law is *ex post facto* or not is the time and the state of the law at which the alleged offense was committed.

ID.—MOTION TO QUASH INDICTMENT—SUFFICIENCY OF EVIDENCE—MODE OF EXAMINATION OF WITNESSES BY GRAND JURY.—A defendant on a motion to quash an indictment can only urge such grounds as are permitted him by section 995 of the Penal Code, and furthermore no inquiry can be made as to the sufficiency of the evidence or the mode of examining witnesses before the grand jury.

ID.—PROCEEDINGS BEFORE GRAND JURY—PRESENCE OF ALLEGED ILLEGALLY APPOINTED DEPUTY DISTRICT ATTORNEY—MOTION TO QUASH PROPERLY DENIED.—An indictment is not subject to a motion to quash on the ground that persons other than those authorized by law were permitted to be present during the proceedings taken before the grand jury, where the alleged unauthorized person was one who had been appointed a deputy district attorney after the number of deputies who are allowed compensation by the statute had been appointed.

ID.—DISTRICT ATTORNEY—APPOINTMENT OF DEPUTIES.—Under section 4230 of the Political Code, a district attorney may appoint as many deputies as he chooses, but if he appoints any in excess of those for which compensation is provided to be paid from the public treasury, he must pay such deputies at his own expense, if they are to receive compensation.

ID.—CHALLENGES TO JURORS—ACTUAL BIAS—OPINIONS FOUNDED ON RUMORS AND NEWSPAPER STATEMENTS.—In a prosecution for the crime of murder by dynamiting a building, it is not error to disallow challenges to jurors for actual bias, where it appeared from the answers given by them that the foundation for their opinions was public rumor, statements in public journals, and common notoriety, each declaring his ability to lay his opinion aside and consider the case against the defendant fairly and impartially.

ID.—REVERSAL FOR DISALLOWANCE OF CHALLENGES — NATURE OF EVIDENCE.—On challenges to jurors for actual bias based on public rumor, statements in public journals, and common notoriety, in order to justify a reversal, the evidence given by the venireman upon his examination must be practically without conflict, and be so opposed to the decision of the trial court that the question becomes one of law.

ID.—CONSPIRACY—EVIDENCE.—In proving a conspiracy it is not necessary that proof be made that the parties met and actually agreed to undertake the performance of the unlawful act, but a conspiracy may be shown by proof of facts and circumstances sufficient to

satisfy the jury of the existence of the conspiracy, leaving the weight and sufficiency of the evidence to the triers of the questions of fact.

ID.—MURDER—DYNAMITING OF BUILDING—CONSPIRACY—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS.—In a prosecution for murder by dynamiting a building, where it is shown by overwhelming proof that a conspiracy had been organized on the part of a labor union and the work thereof prosecuted to the end that at every place in the United States where the open-shop was in force it was planned to use the weapon of nitroglycerin or dynamite to intimidate those opposed to the demands of the union, it was proper to show all of the acts, declarations, and correspondence had between the persons concerned, which referred to the means and methods employed and to be employed in furtherance of the common design, notwithstanding the defendant did not take an active part in the conspiracy until some time after a series of unlawful acts had been committed in other parts of the country.

ID.—EVIDENCE—SUITCASE CONTAINING INCRIMINATING ARTICLES.—In such a prosecution a suitcase containing an alarm clock, a coil of black fuse, some blasting caps, a brass plate, some brass bars with screws, and copies of newspapers containing accounts of the destruction of the building, which was found in the checking-room at a ferry station in another city several months after such destruction, was competent evidence, where the suitcase was identified as being one seen in the possession of one of the conspirators, and the clock and brass pieces were shown to be of a similar kind to those used by such conspirators.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frank R. Willis, Judge.

The facts are stated in the opinion of the court.

Nathan C. Coghlan, Edwin V. McKenzie, Job Harriman, J. H. Ryckman, and William F. Herron, for Appellant.

U. S. Webb, Attorney-General, Robert M. Clarke, Deputy Attorney-General, Thomas Lee Woolwine, District Attorney, and A. H. Van Cott, Deputy District Attorney, for Respondent.

JAMES, J.—Appeal from a judgment directing the imprisonment of the defendant in the state penitentiary for the period of his natural life, and also from an order denying his motion for a new trial.

The defendant was accused by an indictment of a grand jury of the county of Los Angeles, in which several other defendants were named, of having on the first day of October, 1910, feloniously and with malice aforethought murdered one Charles Hagerty. The indictment was filed on the fifth day of May, 1911. Defendant not being apprehended until the year 1915, he was then placed upon trial, which after a lengthy hearing, resulted in a verdict of guilty being returned against him. It will be necessary to make a somewhat extended statement of the evidence heard at the trial, in order to give proper illustration to the argument of appellant, and to the propositions which he advances, and which he claims entitle him to have the judgment reversed. In this statement we shall refer most particularly to the testimony introduced on behalf of the prosecution. The attempt will be only to first furnish in narrative a history of the alleged crime, as the evidence for the people tended to prove it, and we will later consider the competency of the testimony as it is met by objections urged on behalf of the appellant.

In the year 1905 there existed in the United States an organization designated as the International Association of Bridge and Structural Ironworkers. It was an organization, as its name implies, made up of various suborganizations or labor unions scattered throughout the country. The objects as declared by its constitution were "to cultivate feelings of friendship among the craft, to assist each other to secure employment, to reduce the hours of labor, to secure adequate pay for work, . . . and to elevate the moral, intellectual and social condition of all members, and to improve the trade." The offices of the association were in Indiana, and a system was provided by which funds should be collected and disbursed. J. J. McNamara was the secretary and treasurer of the association during the time herein mentioned. The association in 1905 declared a general strike against the American Bridge Company, which was a large contracting concern engaged in the erection of structures of iron and steel. One of the objects desired by the association was to compel all employers who were using nonunion labor to unionize their plants and employ only members of the recognized union. The American Bridge Company was one of the chief employers of nonunion labor, but was not the only concern carrying on business on the open-shop plan in the structural

iron and steel line. J. J. McNamara, apparently without any authority given him by the constitution or members of the organization, unless that authority is deemed to be an implied one, encouraged persons to destroy various work being constructed under the open-shop plan. In 1908 and 1909, bridges, viaducts, and other structural work being done by nonunion employers, to the number of perhaps twenty, were destroyed by dynamite or nitroglycerin. Most of these explosions were produced with the knowledge and active encouragement of J. J. McNamara, and funds of the association were used to pay the persons who destroyed the work. The evidence was sufficient to show that the purpose of J. J. McNamara and fellow-officers of the association was to compel the employers of nonunion labor to accept the dictates of the association, and, in order to do this, the means apparently most ready and acceptable to their hands was the use of dynamite and other high explosives for the purpose of ruining work under construction and destroying the results of the labor of the nonunion employees. It was customary for the heads of local unions scattered about the country, when they desired assistance in protecting their cause in the particular locality, to request of the International Association funds and assistance. In 1910, the attention of J. J. McNamara and his fellow officers was directed to the state of California and particularly to the city of Los Angeles, which was known to be to a considerable extent an "open-shop" city. One Clancy, a leader of an ironworkers' union in San Francisco, wrote to J. J. McNamara several times, asking that a certain man be sent to the west (this man being one Hockin, who had produced several explosions theretofore in the east). J. J. McNamara did not send Hockin, but did send his brother, J. B. McNamara. J. B. McNamara reached Seattle and was there visited by Clancy, and he then proceeded to San Francisco. The McNamaras had themselves concocted an infernal machine which had been used to produce the explosions on the nonunion work. This machine consisted of a "tattoo" clock attached to a board, to which board was also attached a dry battery. By a system of wiring, the clocks on the alarm dials could be set at any chosen hour, and when that hour arrived and the bell-hammer commenced to vibrate, electrical connection would be made from the battery to a fulminating cap attached to dynamite, or whatever explosive was used, and

thus the results planned for would be accomplished. J. B. McNamara, in the office of the association in Indianapolis just before he left there for the coast, said, in the presence of his brother and one McManigal, that he was going out and give them "a damned good cleaning up." At the time J. B. McNamara arrived in San Francisco a great effort was being made to unionize the city of Los Angeles in the iron-working trades, and a great deal of money was spent in that endeavor. The "Los Angeles Times" and the Merchants & Manufacturers' Association of Los Angeles had both advocated the open-shop plan of labor employment, and had been most active in work in opposition to the efforts of the unions to stamp out the open-shop policy. One Zehandelaar was the secretary of the Merchants & Manufacturers' Association, and Harrison Gray Otis was president and manager of the "Los Angeles Times." The defendant was a union worker who resided in San Francisco at and before the occurrence of the explosion which caused the death of Hagerty. He had been active in the work of attempting to unionize the city of Los Angeles, and had visited that city immediately before meeting McNamara, in the interests of the unionist work. Immediately upon the arrival of J. B. McNamara in the city of San Francisco he was visited by defendant frequently. On the seventeenth day of September, 1910, defendant wrote out (the evidence proved his handwriting), an advertisement which was published in two San Francisco newspapers, in the following form:

"Wanted—By party of men, 16-24 foot launch for ten days; cruise around Bay and tributaries. Best of references."

Soon thereafter a launch was rented from a boat furnishing concern. This launch was a power launch and was called the "Pastime." About the same time a man appeared at the office of a company manufacturing high explosives, which office was located in the city of San Francisco. This man desired to purchase a very high explosive, asking for "90 per cent nitroglycerin." Upon inquiry being made as to what work was to be done with it, the manufacturing company's representative was informed that it was desired to be used in blowing out stumps. The applicant was expostulated with by the manufacturer's agent and told that such a high percentage of explosive was not needed, but that a forty per cent grade would be sufficient. However, the higher per cent

quality was insisted upon, with the result that an order was given by the agent to his company to have manufactured five hundred pounds of eighty per cent dynamite. The manufacturing plant of the powder company was located across the bay from San Francisco, and from that plant was later taken the explosive by defendant and two other persons. After securing the launch for a rental period, the men went to Oakland and procured some enameled letters which they placed over the name painted on the launch, and changed it from "Pastime" to "Peerless." Schmidt was one of these men who appeared at the different places. One of the defendant's eyes was defective, and quite noticeably so to the ordinary observer. He was identified by storekeepers at Oakland, by a boathouse-man at Sausalito, where the name of the launch was changed, and by the delivery agents of the powder manufacturing company at the latter's plant. He was identified by persons who were acquainted with his physical characteristics, and who saw him at the numerous times when he visited McNamara during the latter's stay in San Francisco. It will be unnecessary to mention particularly the evidence which described the defendant as being a participant in the work of securing the dynamite. It is enough to say that there was ample evidence to authorize the jury to conclude that he was one of the persons so concerned. The dynamite having been secured, it was taken to the city of San Francisco, and a large part of it stored in an empty house which was rented for the purpose. On the morning of October 1, 1910, an explosion occurred in the building in which the "Los Angeles Times" was published and which was owned by the Times Publishing Corporation. The explosion occurred at 1 o'clock in the morning at a time when numerous of the employees were still at work, the journal published being a morning newspaper. The explosion occurred in a little alley-way which, on the ground floor, separated two portions of the building and which was closed overhead. The explosion was of such violence as to rend iron or steel beams, and to force debris through the roof of the building and to a considerable height above. Fire immediately succeeded the explosion and the building was almost entirely destroyed, twenty-one persons being killed, among them Charles Hagerty. One witness testified to having seen a man whom he believed to be J. B. McNamara in the lower building of the "Times" the night before

the explosion occurred. On the morning of the 1st of October, a suitcase was found near the residence of the president of the Times Company by police officers. One of the officers started to cut open the suitcase, when a whirring noise was heard, and the men immediately got out of the way. When they reached a distance of one hundred feet or more there was an explosion which blew a large hole in the ground, tore the leaves from trees, and broke a number of windows in the neighborhood. At about the same time a package was found close to the residence of Zehandelaar, the secretary of the Merchants & Manufacturers' Association. This package was found to contain a number of sticks of dynamite and an infernal machine manufactured in exactly the way that the McNamaras had before fashioned those instruments of destruction. The dynamite found in this parcel was stamped with the name of the company which furnished the explosive to the defendant and McNamara in San Francisco, and upon being analyzed by a chemist was found to be of the same composition as the lot procured from the company by Schmidt and McNamara. One witness testified that in the summer of 1910 he had a conversation in San Francisco with the defendant, and asked him at that time where he had been. The witness then said: "He said he had been down to Los Angeles, and so we got to talking further. He says, they are having an awful time down there, he says. He says, they are beating up men down there—they won't give a union man any chance down there at all. It is a regular Otis town they are running. There is something going to happen to him pretty soon." After the indictment of defendant, search being made for him, he was not to be found. It was shown in testimony that he had gone to New York and lived at the house of Emma Goldman, a portion of the time under an *alias*. One witness testified that defendant told him that he had intended to go to London, England, but that he could not get away from New York on account of the war. Further, that he (Schmidt) said that if he had had the Los Angeles job alone he could have got out all right with it. The person McManigal, who has been before referred to herein, testified on behalf of the prosecution, and gave evidence relating to the general destructive operations inaugurated and carried out under the direction of J. J. McNamara. The records and

files found in the office of the association at Indianapolis, embracing correspondence had by McNamara with various persons concerned in producing explosions, were introduced in evidence. Taking the testimony all in all, and leaving out of consideration the matter of its competency at this point, it must appear that the evidence was ample to show the active participation of the defendant in the crime which had been committed. To what has been stated, it may be added that there was competent and sufficient evidence to show that the explosion in the Times building was the result of exterior agency, an explosive brought on to the premises and used in an unlawful way. The foregoing is a somewhat meager abstract of the evidence and presents its salient features only. The testimony given at the trial covers about eight thousand pages, and more than six hundred exhibits were introduced before the jury.

The points relied upon by appellant as furnishing ground for his claim that the judgment and order in this case should be reversed will be considered in the order in which they are proposed by his brief.

The defendant upon being brought into court presented a motion in which numerous alleged grounds were set forth as reasons why the indictment should be quashed. One of the principal grounds asserted was that four of the grand jurors were disqualified by reason of bias and prejudice. Defendant, in his affidavit which was presented with the motion, set out many alleged facts which would tend to show that the grand jurors challenged had been, prior to their being sworn on the jury, active in securing information relative to the matter of the explosion which produced the death of Hagerty and the fellow-employees. Under section 995 of the Penal Code, as that law existed at the time of the commission of the alleged homicide, and at the time the indictment was filed, a defendant accused by indictment was permitted, on his motion to set aside the indictment, to urge any ground good on challenge to a trial jury, either as to the panel or an individual juror. In 1911, before the indictment was filed, the legislature by act amended section 995 of the Penal Code, and by that amendment took away the right to urge on such a motion the last-mentioned causes. This act became effective in the latter part of May of the same year, the indictment having been filed in that month of May, but prior to the tak-

ing effect of the law. An affidavit was made by the grand jurors challenged, setting forth in a general way that they had acted without prejudice in the consideration of the defendant's case, and had been uninfluenced by reports or information received by them from outside of the grand jury-room. As the defendant set forth specific facts tending strongly to show that the jurors challenged could scarcely avoid feeling a bias in his case, it is extremely questionable that this affidavit made on behalf of the jurors could have been considered as a complete answer to the motion, as to the particular ground mentioned. However, the defendant did ask leave to examine the jurors in open court, which leave was denied him, and this brings us directly to the important question to be considered, to wit, as to whether the law in existence at the time the motion to quash the indictment was made, was applicable to the proceedings on that motion, or whether the law in force at the time of the commission of the alleged homicide and the filing of the indictment, is the one under which the defendant's motion should have been determined. If the law applicable was the law in effect at the time of the commission of the homicide and the filing of the indictment, then the court committed error in denying the defendant's motion.

It is the contention of the appellant that the change in the law by which the ground of the bias and prejudice of the grand jurors as foundation for a motion to set aside the indictment, was taken away, if made to apply to the motion when presented by him, would be *ex post facto*, and hence unconstitutional. The definition of an *ex post facto* law is given very full exposition by the supreme court of the United States in the leading case, which is entitled *Kring v. Missouri*, 107 U. S. 221, [27 L. Ed. 506, 2 Sup. Ct. Rep. 443]. In determining whether a law is *ex post facto* or not, the decisions sometimes declare that where such law merely works a change in procedure or remedy, it is not amenable to objection as being unconstitutional on the ground stated. Such a definition is perhaps too narrow, as the court in the *Kring* case takes occasion to declare. In the case cited, referring to *Calder v. Bull*, 3 Dall. 386, [1 L. Ed. 648], the court approvingly adopts language in definition of the term *ex post facto* when it declares: "It defines four distinct classes of laws embraced by the clause. '1. Every law that makes an action,

done before the passing of the law and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates the crime or makes it greater than it was when committed. 3. Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender.''" The statement of the writer of the opinion in *Calder v. Bull* is further quoted, where he says: "But I do not consider any law *ex post facto*, within the prohibition, that modified the rigor of the law; but only those that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction." The gist of the decision is that any substantial right which the law gave a defendant at the time to which his guilt relates cannot afterward be taken away from him, even though such law does affect "procedure or remedy." The right referred to, however, must be, and such is the tenor of the decisions, a right material to the establishment of the defense of the defendant. Objections to the form of pleadings, not going to the extent of reaching a defect in the statement of facts showing the offense, generally and naturally must be held to fall within that class of law changes which do relate to procedure merely, and to procedure *not such as a defendant accused of crime may be said to have a vested right in*. A law curtailing the number of peremptory challenges which a defendant may interpose to the trial jury is held not to be *ex post facto*. (*Harris v. United States*, 4 Okl. Cr. 317, [Ann. Cas. 1912B, 810, 31 L. R. A. (N. S.) 820, 111 Pac. 982].) Laws which in a statute passed after the commission of a crime and before the trial, make witnesses competent to testify who at the time of the commission of the offense were by law incompetent, are held not to deprive a defendant of a substantial right. (*Mrous v. State*, 31 Tex. Cr. 597, [37 Am. St. Rep. 834, 21 S. W. 764]; *Hopt v. Utah*, 110 U. S. 574, [28 L. Ed. 262, 4 Sup. Ct. Rep. 202].) See, also, note to *People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 594, [23 L. R. A. 830, 35 N. E. 951].) Our own supreme court, in the case of *People v. Campbell*, 59 Cal. 243, [43 Am. Rep. 257], has held that where a homicide was committed before the adoption of the constitution of 1879, and at a time when

the law required that the defendant be prosecuted by indictment of a grand jury, and by the constitution before trial it was provided that the prosecution might be either by indictment by grand jury or information of the district attorney, that a prosecution by information was not invalid, and that the law then in force was not open to the objection that it was *ex post facto*. In that case the court adopted the language of Judge Cooley, as contained in his work on Constitutional Limitations, page 331, and which finds place repeatedly in decisions dealing with the subject under consideration, and quotes: "But so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings, if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure, though it cannot lawfully, we think, in so doing, dispense with any of these substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute, calculated simply to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right." The court further says, referring to the text of Judge Cooley's work: "The following examples are given by him in a note to page 332: 'The defendant in any case must be proceeded against and prosecuted under the law in force when the proceeding is had. A law is not unconstitutional which precludes a defendant in a criminal case from taking advantage of remedies which do not prejudice him; nor one which reduces the number of the prisoner's peremptory challenges; nor one which, though passed after the commission of the offense, authorizes a change of venue to another county; nor one which modifies, simplifies, and reduces the essential allegations in a criminal indictment, retaining the charge of a distinct offense.' . . . It is not an

uncommon practice to change the number of grand jurors required to investigate criminal charges, but we have never heard of the right of the legislature to make such changes questioned, neither has it ever been claimed that the charge must be investigated by the precise number of grand jurors of which that body was composed, at the time the act was committed. . . . 'The legislature may always alter the form of administering right and justice, and may transfer jurisdiction from one tribunal to another.' Mr. Bishop, in his work on *Statutory Crimes*, lays down the same doctrine. He says: 'There is no such thing as a vested right in any particular remedy.' " (See, also, *People v. Mortimer*, 46 Cal. 114.) The time important to be taken into consideration in determining whether a law is *ex post facto* or not is the time (and the state of the law) at which the alleged offense was committed. "If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an *ex post facto* law. If passed after the commission of the offense, it is as to that *ex post facto*, though whether of the class forbidden by the constitution may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed, to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character." (*Kring v. Missouri*, 107 U. S. 221, [27 L. Ed. 506, 2 Sup. Ct. Rep. 443].) It happened in this case that the law making the change in the statute was passed after the commission of the alleged offense and before the indictment was filed, but that it did not become operative until after the indictment was filed. It was in effect before the defendant was arrested and before he made his motion to quash the indictment. As this law in its changed form referred to the procedure under which the defendant might attack the indictment, it on its face was effective at the time the motion to quash was made, and was the procedure to be looked to in governing the motion of the defendant. That it did not deprive him of a right substantial in his defense, we are also assured. A defendant under our law may be prosecuted by indictment or by information after commitment by a magistrate. There is no legal impediment at all, if the lawmakers so decide, in permitting a commitment to be made

by a biased or prejudiced magistrate, or an indictment to be returned by a grand jury holding preconceived views as to the guilt of a defendant. The indictment surely must be made to state a public offense, for the defendant cannot be legally put upon trial upon one which is insufficient in that respect. The matter of the production of an indictment by grand jury or commitment by a magistrate neither presupposes the guilt of a defendant nor in any wise tends to create any presumption in that direction. It furnishes a procedure by which the defendant is brought into court, and if this procedure on its face is formally regular, any special objections which are to be established by facts *dehors* the record, must be viewed as not of the substance of things or material in influencing the conviction of a person accused of crime. "An indictment is but an accusatory paper." (*People v. Hatch*, 13 Cal. App. 521, 528, [109 Pac. 1097].) Our code by specific provision declares that, unless objections available to a defendant on a motion to quash an indictment or information are taken seasonably, they are waived; in other words, the indictment or information, because of any defects which might be pointed out upon the motion to quash, is not a void indictment and the question of legal jurisdiction is not concerned therein. (*Pen. Code*, sec. 950; *Ex parte McConnell*, 83 Cal. 558, [23 Pac. 1119]; *People v. Bawden*, 90 Cal. 195, [27 Pac. 204]; *Ex parte Moan*, 65 Cal. 216, [3 Pac. 644].) We cite these cases and the code law in illustration of the view we take, that the amended section of the Penal Code in force at the time the defendant made his motion to quash the indictment, not only related to a matter of procedure, but to such matter of procedure as neither went to the question of the guilt or innocence of the defendant nor tended to deprive him of any substantial right theretofore secured to him in aid of a full defense.

In the motion to quash the indictment, it was also asserted by the defendant that persons other than those authorized by the law were permitted to be present during the proceedings taken before the grand jury, and that evidence of illegal, hearsay, and secondary character was permitted to be introduced and was considered. It is well settled, not only that a defendant on a motion to quash an indictment can only urge such grounds as are, by section 995 of the Penal Code, permitted him, but that no inquiry can be made as to the suffi-

ciency of the evidence or of the mode of examining the witnesses heard before the grand jury. (*In re Kennedy*, 144 Cal. 634, [103 Am. St. Rep. 117, 1 Ann. Cas. 840, 67 L. R. A. 406, 78 Pac. 34].) To the same effect is *People v. Hatch*, 13 Cal. App. 521, [109 Pac. 1097]. In support of the ground that an unauthorized person was permitted to be present during the proceedings had before the grand jury, the defendant referred to Earl Rogers, Esq., who appeared in the capacity of a deputy district attorney of Los Angeles County. It was shown that said Rogers had been duly appointed as a deputy by the district attorney, but it is urged that as all of the deputies permitted to be appointed under section 4230 of the Political Code, had theretofore been appointed, the appointment of Mr. Rogers was in excess of that number, and he acquired no official capacity as a prosecutor in order to entitle him to be present himself before the grand jury. Section 4230 of the Political Code refers particularly to the salaries of officers, and does designate the various deputies who shall be allowed, *with pay*, to each of the county officers in counties of the class to which Los Angeles belongs. That section is particularly designed to fix the compensation of county officers, and not to limit them in the employment of deputies. A county officer is entitled to appoint as many deputies as he chooses, with the proviso that if he appoints any in excess of those for which compensation is provided to be paid from the public treasury, he must pay such deputies if they are to receive compensation. (Pol. Code, sec. 4024.)

The next complaint made by appellant is that the trial judge committed prejudicial error in disallowing certain challenges taken by the defendant as to seventeen of the veniremen who were examined as to their qualifications to sit as jurors and try the defendant for the crime charged. The challenges interposed were all upon the ground of the actual bias of the veniremen. As was most natural to occur, after the destruction of the Times building reports as to the cause thereof were widespread and became the subject of discussion between individuals, as well as furnishing material for various reports in the newspapers. Prior to the impanelment of the jury which sat at the trial of this defendant, the two McNamaras jointly charged in the same indictment with defendant, had pleaded guilty and been sentenced, and this in-

formation had been heralded forth through like channels. Many of the veniremen called had read newspaper reports and heard street discussion regarding the explosion and its cause. The state of mind of each of the seventeen veniremen, as developed by the lengthy examination of counsel, was in the main similar as to the matters constituting the alleged bias. A general statement of the answers brought forth, with little variation, was about as follows: The venireman had heard of the explosion in the Times building shortly after it occurred; he had read accounts thereof in the newspapers and had discussed with persons not concerned in the case the subject of the explosion; that these accounts assigned the cause of the wrecking of the Times building as being the explosion of dynamite unlawfully used; that upon the McNamaras pleading guilty to the charge, venireman had read an account of the proceedings and from all of these things had formed an opinion that the Times building had been blown up by dynamite unlawfully exploded with criminal intent; that the opinion was more or less fixed and that evidence would be required to dislodge it. None of the veniremen in any opinion or belief which they entertained, connected the defendant with the commission of the crime, save one, who stated in a general way that he held an opinion affecting the guilt of the defendant. Some of the veniremen had passed the scene of the explosion and had observed the wreckage, with twisted iron beams, and in some cases had observed that windows in an adjoining building had been shattered. In the course of their questioning, counsel for the defendant intimated that it was a part of their defense that the Times building was destroyed by a gas explosion accidentally, and not by dynamite with criminal intent. The argument in support of the challenge was that, as these veniremen had formed an opinion as to the facts establishing the *corpus delicti*, they were utterly disqualified, notwithstanding that they in no wise in their opinion otherwise connected the defendant with the commission of the crime. It satisfactorily appeared from the answers given by the veniremen that the foundation for any opinion entertained by them was that denominated in section 1076 of the Penal Code, as "public rumor, statements in public journals, or common notoriety"; and each of the persons examined declared that he had the ability to lay that opinion aside and to consider the case against the defendant fairly

and impartially. This statement was brought forth by the examination of the district attorney in order to justify a denial of the challenges in accordance with the provisions of section 1076 of the Penal Code, which declare that where the opinion is of the class mentioned the person should not be disqualified as a juror, "provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." As has been already suggested, it appeared that the explosion which destroyed the building of the newspaper was of such character as to occasion general discussion among the citizens of the community and much comment in the public journals. It would seem difficult indeed to have found any citizen of observing mind and fair intelligence who had not by some manner or means learned of the disaster, and of the probable or possible cause thereof. It has been repeatedly declared by our supreme court that on challenges such as those here considered, in order to justify a reversal, the evidence given by the venireman upon his examination must be practically without conflict as to the vital points thereof, and be "so opposed to the decision of the trial court that the question becomes one of law." (*People v. Owens*, 123 Cal. 482, [56 Pac. 251].) And particularly pertinent to the situation which was presented in this case are the observations of Mr. Justice Henshaw in the case of *People v. Scott*, 123 Cal. 434, [56 Pac. 102], where he says: "A reading of the testimony taken on *voir dire* discloses, as is usual, conflicting and contradictory statements by the jurors. They had formed opinions touching the guilt or innocence of the defendant. They would carry these opinions with them into the jury-box. It would take evidence to remove them, nevertheless they could and would give the defendant a fair and impartial trial. They could and would be governed by the law as delivered by the court, and by the evidence as received in court. It is the state of facts commonly presented where upon the question of bias the evidence would have justified a finding either way. Under such circumstances we are powerless to disturb the ruling of the trial court. (Citing *People v. Fredericks*, 106 Cal. 554, [39 Pac. 944].) We recognize that with the increased facilities for the dissemination of news it is far more difficult than formerly it was to obtain a jury of men ignorant

of the circumstances of the charge which they are called upon to try. . . . But, unless the testimony adduced upon *voir dire* is so clear upon the question of actual bias that this court can say as matter of law that the juror is disqualified for that reason, we cannot disturb the ruling of the trial court." To like effect are many of the decisions, and we cite: *People v. Flannelly*, 128 Cal. 83, 84, [60 Pac. 670]; *People v. Ochoa*, 142 Cal. 268, [75 Pac. 847]; *People v. Miller*, 125 Cal. 44, [57 Pac. 770]; *People v. Brown*, 148 Cal. 743, [84 Pac. 204]. In so far as the examination of the jurors disclosed that their observation of the conditions at the wrecked building after the explosion contributed to the forming of the opinion they had, it appears that such observation only tended to convince them of the fact that there had been an explosion, and not as to the means employed. It seems to have been conceded, even in the questions of counsel propounded to the veniremen, that an explosion had in fact occurred. The denial of the challenges for actual bias cannot be said to have been improperly made.

We now come to a consideration of the kind and competency of the evidence which made up the proof offered by the prosecution. As a part of its case, the state, as we have before indicated, introduced testimony showing a series of unlawful acts which had been committed some time prior to the first appearance of the appellant Schmidt in his connection with the anti-open-shop campaign. This testimony included evidence of the fact that bridges had been blown up, material destroyed, and life threatened throughout a number of the eastern states as a result of the determination of the executive board of the International Association of Bridge and Structural Ironworkers to unionize work; that money had been paid to various persons for the purpose of compensating them in the unlawful and reprehensible enterprise. Conversations occurring between the persons so engaged, some of them referring to explosions which had already occurred, some of them referring to future plans in the same direction, were narrated; in fact, it is apparent that any and every act of the individuals concerned referring to the unlawful enterprise, wherever evidence thereof could be procured, was presented to the jury. The record of correspondence kept in the office of J. J. McNamara, the secretary-treasurer of the International Association, was obtained and was also produced in evidence. This

was correspondence passing between the office of McNamara and various persons concerned in the unlawful depredations undertaken by the executive board of the association, and it came and went to different cities scattered over the United States. The work of destruction of structures erected by open-shop contractors in the east was well under way before Clancy's appeal for help in California was received and heeded. As a result of that appeal J. B. McNamara came west on his mission of destruction. Plainly from the sketch we have made of the evidence, it was made to appear by overwhelming proof that a conspiracy was organized and the work thereof prosecuted to the end that at every place in the United States where the open shop was in force it was planned to use the weapon of nitroglycerin or dynamite to intimidate those opposed to the demand of the executive board of the International Association. The evidence showed that this conspiracy, so gigantic in its scope, was a continuing one—that is, the only limit to its life seemed to be the exhaustion of the means available to the executive board, or the submission of the employers of nonunion labor. And we think that counsel for appellant fails to apprehend the effect of the evidence to establish the conclusions just suggested, when he refers to the destructive work done in the east as work done in the "Eastern conspiracy." The distinction so sought to be impressed, and which we cannot allow, is made for the purpose of giving weight to the argument found in the brief of appellant, that the appellant Schmidt not being a party to the lawless acts committed in the east, was prejudiced because of evidence being introduced with reference to such acts. Conceding the correctness of his premise, we might well adopt the appellant's conclusion. But the basis for the argument is lacking in the proof. It is a fundamental rule long settled by decisions that in proving a conspiracy it is not necessary that proof be made that the parties met and actually agreed to undertake the performance of the unlawful act, and that a conspiracy may be shown by proof of facts and circumstances sufficient to satisfy the jury of the existence of the conspiracy, leaving the weight and sufficiency of the evidence to the triers of the questions of fact. (*People v. Donnolly*, 143 Cal. 394, [77 Pac. 177]; *People v. Lawrence*, 143 Cal. 148, [68 L. R. A. 193, 76 Pac. 893]; *People v. Eldridge*, 147 Cal. 782, [82 Pac. 442].) It is not denied that after a conspiracy has been

established, and it has been established that a person is connected therewith as a conspirator, the latter may be prosecuted as for complicity in any unlawful act thereafter committed by any of the conspirators which is within the scope of the general design or plan. (*People v. Olsen*, 80 Cal. 122, [22 Pac. 125].) "Where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. . . . Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the common design for which they combined." (*People v. Kauffman*, 152 Cal. 331, [92 Pac. 861]; *People v. Creeks*, 170 Cal. 368, 369, [149 Pac. 821]; *Spies v. People (The Anarchists' Case)*, 122 Ill. 1, [3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898].) In *People v. Collins*, 64 Cal. 293, [30 Pac. 847], our supreme court says: "The law holds each party to it (the conspiracy) responsible for the acts of each co-conspirator done in pursuance and furtherance of the common design, which extends to the consequences which might reasonably be expected to flow from carrying into effect the unlawful combination." And again: "Evidence of the statements of a co-conspirator, made during the life of the conspiracy, are admissible against the other conspirator." (*People v. Oldham*, 111 Cal. 648, [44 Pac. 312].) An examination of the decision in the case of *Ryan v. United States*, decided by the circuit court of appeals and reported in 216 Fed. at page 13, [132 C. C. A. 257], shows that a number of persons, thirty in all, they being connected with the same association hereinbefore referred to, were indicted for a conspiracy to commit the crime of transporting dynamite and nitroglycerin in interstate commerce in passenger trains, the facts of the case referring to the same occurrences and the same conspiracy as the prosecution here made proof of. It seems that practically the same testimony as to the various explosions produced, the means employed, the correspondence had, together with conversations between the participants in those crimes, were all offered and received in evidence. The court there declared that such evidence was competent in that a continuing conspiracy was charged. If the evidence was

admissible there to show a continuing conspiracy as charged, it may with as much propriety here be said that the evidence did establish that the conspiracy was of that nature. Being of that nature, it was proper to show, as the court there held, all of the acts, declarations, and correspondence had by the persons concerned which referred to the means and methods employed, and to be employed, in the furtherance of the common design. It matters not, if the evidence is sufficient to show such later connection, that Schmidt, the appellant here, for the first time took an active part in furnishing aid to the conspirators to effect their objects a considerable time after the eastern explosions had been produced. The proof of all of the matters first adverted to was essential to show the existence of the conspiracy and to define its nature and scope. The necessity of showing appellant's connection with the conspiracy was a distinct and separate matter for proof. This requisite of the law we think was sufficiently covered in the instructions of the court, and the jury was fairly advised of the subjects to which the different varieties of evidence were properly applicable. For the reasons we have stated, validity cannot be granted to any one of the exceptions taken because of the introduction of declarations of any of the conspirators made after any particular of the explosions had been caused, as being declarations inadmissible because made subsequent to the completion or accomplishment of the object of the conspiracy. The conspiracy was still alive and in effect and the ultimate results had not been attained when J. B. McNamara came to the state of California for the purpose of assisting in the work. We have before sketched briefly the salient features of the testimony showing that Schmidt, upon McNamara's arrival in San Francisco, took an active part in securing dynamite for McNamara's use. All of the appellant's acts in that connection were performed as secretly as possible, under assumed names, and with every indication of appellant's complete and active co-operation and sympathy with the work of destruction theretofore done, then being planned, and which was thereafter executed. Schmidt, the appellant, immediately before the Times explosion, had been in the city of Los Angeles aiding in the attempt to close the open shops. That he knew for what purpose the dynamite was to be used, is indicated when he said to a witness who testified in the case, in the summer of 1910, that "they [in

Los Angeles] won't give a union man no chance down there at all. It is a regular Otis town they are running. There is something going to happen to him pretty soon." And immediately after the Times explosion Schmidt was not to be found, and was not found until a long time thereafter, when he was discovered living at the house of Emma Goldman in New York, a portion of the time, under an assumed name. The length of this opinion would be extended to a greater limit than is warranted, were we to attempt to discuss in detail the testimony as it is shown in the eight thousand pages of the reporter's transcript. While there may be portions of the testimony received which in a detached way could properly have been excluded, the weight of the evidence was so overwhelming in its proof of the conspiracy and its objects as to enforce the conclusion that the defendant in the rights secured to him under the constitution did not suffer substantial prejudice. Rather unusual stress is laid in support of the claim for error in allowing one particular bit of evidence to come in. Several months after the explosion which occurred at the Times building, a suitcase was found in the checking-room at a ferry station in San Francisco. The suitcase was identified by a Mrs. Ingersoll as being one which she had seen in the possession of J. B. McNamara before the 1st of October. The suitcase carried a check label, and upon being opened was found to contain an alarm clock, a coil of black fuse, some blasting caps, a brass plate, some brass bars with screws, and copies of San Francisco newspapers dated October 1st. The newspapers contained accounts of the destruction of the Times building. These articles were all exhibited to the jury. We think the evidence was competent. The clock and brass pieces were of a similar kind to those used by the McNamaras in the manufacture of their infernal machines. As proof of the fact that an explosion had been produced as "bargained for," J. J. McNamara, the secretary-treasurer of the association, had always required his men to produce newspaper accounts showing that they had performed their work successfully. In a circumstantial way, these articles were all evidence tending to show the execution of the work of the conspirators and to show J. B. McNamara's connection therewith, and incidentally the connection of Schmidt with the same enterprise. The introduction of similar evidence was approved in *Spies v. People (The Anarchists'*

Case), 122 Ill. 1, [3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898]. The gravity of the offense and the serious consequences which it has entailed to this appellant, is justification to counsel for having presented the very extensive argument which is found in the three volumes of appellant's briefs. Careful consideration has been given to each of the contentions therein set forth, the chief of which are made the subject of the foregoing discussion. Other matters urged as constituting error, such as alleged misconduct of the trial judge and the argument affecting the action of the court in giving or refusing to give certain of the instructions, we find without merit. We are satisfied that the defendant received a fair trial and that his conviction should be sustained.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 14, 1917, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 14, 1917.

[Crim. No. 666. First Appellate District.—April 17, 1917.]

THE PEOPLE, Respondent, v. VITALE MARINO,
Appellant.

CRIMINAL LAW—RAPE—EVIDENCE OF PRIOR ACTS.—In a prosecution for the crime of rape, evidence of the commission of prior acts is admissible upon the theory that the same tends to show the lewd and lascivious tendencies and disposition of the prosecutrix and defendant.

Id.—EVIDENCE OF PRIOR PREGNANCY AND ABORTION.—In a prosecution of a father for rape upon his seventeen year old daughter, evidence that when the prosecutrix was about fourteen years of age she became pregnant as the result of an act of sexual intercourse with her father, and when she informed him that "she did not get her monthlies," he stated that he knew what was the matter with her and took her to a doctor, who performed an abortion, is admissible for the purpose of showing that the defendant's conduct when in-

formed of the interruption of the daughter's menstrual periods was tantamount to an admission that he knew she was pregnant, and that he was the cause thereof.

ID.—PENETRATION OF SEXUAL ORGANS—INSTRUCTION.—In such a prosecution, while it was improper to refuse to instruct the jury that the defendant should not be convicted unless it could be said after consideration of all the evidence that the defendant had penetrated the sexual organs of the prosecutrix, the defendant was not prejudiced by such refusal, where the jury were instructed in accordance with section 261 of the Penal Code defining the crime of rape to be an act of sexual intercourse accomplished with a female not the wife of the defendant, when the female is under the age of eighteen, since the phrase "sexual intercourse" implies actual penetration.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. W. A. Beasly, Judge.

The facts are stated in the opinion of the court.

W. H. Tully, for Appellant.

U. S. Webb, Attorney-General, John H. Riordan, Deputy Attorney-General, Arthur M. Free, District Attorney, and Archer Bowden, Deputy District Attorney, for Respondent.

LENNON, P. J.—Upon this appeal from a judgment of final conviction after a verdict finding the defendant guilty of the crime of rape upon his seventeen year old daughter, the sufficiency of the evidence to support the verdict is not challenged. A reversal of the judgment is urged because of the ruling of the trial court, which, over the objection of the defendant, permitted the prosecutrix to testify in substance that when she was about fourteen years of age she became pregnant as the result of an act of sexual intercourse with her father. Upon that occasion she told her father, the defendant, that "she did not get her monthlies." The defendant replied: "I know what's the matter with you—you are in the family way." The defendant then left the house and two or three hours later returned, whereupon he said to the prosecutrix: "Dress up and I will take you to a place where you will get over what you have." Defendant took the prosecutrix to the home of a Mr. Gibson, and while there told her in Italian to "tell Dr. Gibson" that she was "in a family

way." She so told Gibson, who replied that he could help her but that he "could not do it for nothing." Whereupon the defendant promised to pay Gibson the sum of \$50. At this point in the testimony of the prosecutrix the trial court sustained an objection to a question which sought to elicit what Gibson did to her, but permitted her to say that she remained alone with Gibson for three or four hours, after which she was taken "to some place to get well," where she remained "very ill" for about a week. The defendant called there to see her in the evening of the day that she left Gibson's house, and said to her, "How are you? Are you better?"

We see no error in the ruling complained of which permitted the above narrated facts to go in evidence. The act of sexual intercourse referred to therein was one of a series of such acts which the prosecutrix testified had been committed with her by the defendant from the time that she was fourteen years of age. Under the settled rule in this state the evidence of those prior acts was admissible in support of the charge upon which the defendant was being tried, upon the theory that it tended to show the lewd and lascivious tendencies and disposition of the prosecutrix and defendant. (*People v. Castro*, 133 Cal. 11, [65 Pac. 13].) It is conceded that if the pregnancy of the prosecutrix and the abortion to which she testified had resulted from the act of intercourse which constituted the basis of the charge for which the defendant was convicted, proof thereof would be proper and pertinent for the purpose of establishing the *corpus delicti*. (*People v. Tarbox*, 115 Cal. 57, [46 Pac. 896].) While in the case of *People v. Soto*, 11 Cal. App. 431, [105 Pac. 420], the court said: "So far as we are aware" it has never been held that proof of the pregnancy of the prosecutrix under the age of consent is admissible except for the purpose of establishing the *corpus delicti* of the charge, on the other hand we know of no authority—and none has been cited to us—which holds that such proof of pregnancy, and evidence of an abortion performed upon the prosecutrix, as the result of one of a series of prior acts of sexual intercourse are not admissible as tending to show the commission of that act. However that may be, the record shows that the proof pertaining to the pregnancy of the prosecutrix following the particular prior act in question, and the abortion performed upon her, was prof-

ferred and received primarily for the purpose of showing that the defendant's conduct when informed by his daughter of the interruption of her menstrual periods was tantamount to an admission that he knew she was pregnant, and that he was the cause thereof. Such we think was the fair inference to be drawn from such testimony, and consequently for that purpose, if for no other, it was admissible. The fact that it also tended to show the commission of two separate, independent, and outlawed crimes did not render it incompetent as evidence for the purpose for which it was offered. Being one of a series of prior acts of sexual intercourse, the remoteness of the particular act under discussion, and of the incidental pregnancy and abortion from the time of the commission of the particular act forming the basis of the charge on trial may have lessened the weight of such evidence, but did not destroy its relevancy.

The trial court refused a requested instruction to the effect that proof of penetration, however slight, was essential to the crime of rape, and that therefore the defendant should not be convicted unless it could be said, after a consideration of all of the evidence, to a moral certainty, etc., that the defendant had penetrated the sexual organs of the prosecutrix. While this instruction correctly stated the law, and should not perhaps have been refused, nevertheless the failure to give it caused no detriment to the defendant, for the reason that the trial court in its charge, in substantial accord with the language of the statute (Pen. Code, sec. 261), defined the crime of rape to be "an act of sexual intercourse accomplished with a female not the wife of the defendant when the female is under the age of eighteen." The phrase "sexual intercourse" as employed in this definition of rape, is commonly understood, we think, to imply an actual penetration. This being so, it is evident that the charge of the court, considered as a whole, in effect required the jury to find the fact of penetration before they could find the defendant guilty.

The judgment and order appealed from are affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 14, 1917.

[Civ. No. 2055. Second Appellate District.—April 17, 1917.]

MATTHEW BAILEY, Respondent, *v.* T. A. BAKER, Sheriff of the County of Kern, Appellant.

SHERIFFS—UNEXECUTED PROCESS AT EXPIRATION OF TERM—DUTY OF SUCCESSOR—MANDAMUS.—Under the provisions of section 4171 of the Political Code, process remaining with a sheriff unexecuted at the expiration of his term of office is to be executed by his successor, and *mandamus* will not issue to compel the outgoing sheriff, after the expiration of such term, to complete the execution of partly executed process.

APPEAL from a judgment of the Superior Court of Kern County. Milton T. Farmer, Judge.

The facts are stated in the opinion of the court.

J. W. Wiley, for Appellant.

E. L. Foster, Geo. E. Whitaker, and Chas. A. Barnhart, for Respondent.

CONREY, P. J.—The defendant appeals from a judgment directing the issuance of a peremptory writ of mandate requiring him, as sheriff of the county of Kern, to take possession of and deliver to the plaintiff certain described personal property. A former judgment, rendered in October, 1913, after an order sustaining a demurrer to the petition, was reversed by this court. For a statement of the facts alleged in the petition we refer to that decision. (*Bailey v. Baker*, 28 Cal. App. 537, [153 Pac. 242].) The case was tried by the superior court in January, 1916, and the present appeal purports to be from a judgment rendered on February 9, 1916.

The court found the facts in accordance with the allegations of the petition; also that the personal property described in the petition was not claimed by any person other than the Security Trust Company; also that after having taken possession of the property as required in the claim and delivery proceedings in the action of *Bailey v. Security Trust Company*, the defendant sheriff redelivered the same to that corporation, although there had not been given to the plain-

tiff Bailey any notice of time and place when the sureties would justify, and the sureties did not justify upon the re-delivery undertaking which had been given by the Security Trust Company to the sheriff. The court further found that the term of defendant Baker as sheriff expired in January, 1915, and that from and after that date one D. B. Newell was and is the duly elected, qualified, and acting sheriff of Kern County.

Appellant claims that the judgment should be reversed for the reason that a writ of mandate may not issue against an ex-sheriff to compel him to perform duties under process placed in his hands while he was sheriff. We have decided this question in another proceeding incidental to the present case. (*Ex parte Baker*, 32 Cal. App. 320, [162 Pac. 922].) That was a *habeas corpus* proceeding arising out of an order committing Baker to the custody of the sheriff for contempt by reason of his refusal and neglect to comply with the directions of the writ of mandate issued in this case. This court held that the duties of sheriff under the facts of this case were controlled by section 4171 of the Political Code, wherein it is provided that: ". . . When any process remains with the sheriff unexecuted, in whole or in part, . . . at the expiration of his term of office, said process shall be executed by his successor or successors in office. . . ." Having stated the rule that the powers of the office shall not continue to be exercised by one whose term has expired, we said: "Unexecuted process in his hands does not lose its force, but the power of the law with respect to such process thereafter moves through the arm of the new officer, to whom whatever belongs to the office should be delivered." We are satisfied with the conclusions reached in *Ex parte Baker*, *supra*, from which the further conclusion follows that the appeal should be sustained.

The judgment is reversed.

James, J., and Shaw, J., concurred.

[Crim. No. 300. Third Appellate District.—April 18, 1917.]

THE PEOPLE, Respondent, v. E. K. WAKAO and
M. ISHIHASHI, Appellants.

CRIMINAL LIBEL—INFORMATION—VENUE.—In view of the provisions of section 9 of article I of the constitution that all criminal prosecutions for libels, indictments found, or information laid for publications in newspapers, shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, an information laid in a county other than that wherein the newspaper was published must allege that the party libeled resided in the county in which the action was brought in order to give the court jurisdiction of the offense.

ID.—RESIDENCE OF COMPLAINING WITNESS—KNOWLEDGE OF DISTRICT ATTORNEY.—In a prosecution for criminal libel the district attorney is presumed to know the residence of the complaining witness, and the defendant is not charged with such knowledge.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order denying a new trial. Malcolm C. Glenn, Judge.

The facts are stated in the opinion of the court.

R. P. Henshall, and R. B. McMillin, for Appellants.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—This is an action in which defendants were accused, by information laid in Sacramento County, of the crime of libel, as follows: "That the said E. K. Wakao and M. Ishihashi on the — day of December, 1915, in the County of Sacramento, in the said State of California, and before the filing of this information, did then and there willfully, unlawfully and maliciously and with intent thereby to injury (injure!) and defame one Risaburo Hattori and to impeach his honesty and integrity and virtue and reputation and to expose him, the said Risaburo Hattori, to public hatred and contempt and ridicule, did compose, print, and publish in a certain newspaper called 'The Central California Times,' printed and published in the County of Fresno, State of

California, and circulated therein and which said newspaper was then and there circulated and published in the County of Sacramento, State of California, certain false, scandalous, malicious, defamatory and libelous words of, and concerning the said Risaburo Hattori, in the Japanese language, as follows, to wit: [Then follows a photographic copy of the newspaper article and its alleged translation.] Contrary to the form, force and effect of the statute," etc.

The jury returned a verdict of guilty as charged. Defendants moved for a new trial on statutory grounds, and also moved in arrest of judgment on the ground that the court "has not and never had any jurisdiction of the offense charged in the information." The motions were denied, whereupon defendants were sentenced to imprisonment for the period of one year each in the county jail. They appeal from the judgment and order denying their motion for a new trial.

The principal point now urged for a reversal of the judgment is that the court was without jurisdiction, and the contention is based upon the failure of the information to allege that Hattori, the person alleged to have been libeled, resided in Sacramento County at the time said newspaper was circulated therein.

Section 9 of article I of the constitution of the state provides that in all criminal prosecutions for libels, "indictments found, or information laid, for publication in newspapers shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause."

The interpretation put upon this provision of the constitution by the attorney-general is that "it was intended to give defendant a defense in the event the offense was prosecuted in any other county than Fresno or Sacramento"; that it "does not prescribe a rule of pleading, but merely shows a rule of defense," and hence it was not necessary to allege in the information that Hattori, the person libeled, was, at the time the libel was circulated in Sacramento County, a resident therein. If this be true, it would be equally true that had the information been laid in Fresno County it would not have been necessary to allege that the newspaper mentioned had its "publication office" in that county. That is to say—the information charging the publication of the offensive article

to have been made in a newspaper in the county where the information is laid need not state that the newspaper had its publication office in that county; nor, if the information is laid in another county, need it state that the complainant resided in such county. We cannot assent that an information constructed on such interpretation of the constitution would be sufficient.

Under the constitution of 1849 such prosecutions could be made in any county in the state where the newspaper was circulated. It was said in *Older v. Superior Court*, 157 Cal. 770, [109 Pac. 478]: "The prior evil especially intended to be remedied was the danger of prosecution in any county where the libel was circulated, with power to select any judge in the state. This evil was remedied by limiting the venue to two counties only, that of the place of publication, and that of the residence of the complainant."

Venue means place of trial and place of trial means the jurisdiction of the court which, in the present case, is limited by the constitution to one of the two counties mentioned therein. The libelous article may be circulated in every other county in the state, but the superior court has no jurisdiction to bring the offender to trial in any of these counties, for the reason that the constitution has declared that jurisdiction resides only in the two counties specified. It seems to us that to confer this jurisdiction it is essential that the particular facts upon which it depends should be alleged.

It is a well-settled principle of law that the information or indictment must allege that the offense was committed within the jurisdiction of the court. (*People v. Wong Wang*, 92 Cal. 277, 281, [28 Pac. 270]); and this is the code rule. (Pen. Code, sec. 959.) That is, the information must allege facts from which jurisdiction will be made to appear. In the present case the jurisdiction depended upon the fact that the party libeled resided in Sacramento County, and this fact should have been alleged in the information.

In *Henderson v. Palmer Union Oil Co.*, 29 Cal. App. 451, [156 Pac. 65], it was held that jurisdiction to appoint a receiver, under section 565 of the Code of Civil Procedure, upon the dissolution of a corporation, resides alone in the county where the corporation carries on its business, or has its principal place of business; and that where an application based upon a verified complaint which failed to show that the county

in which the action was brought was the county in which the corporation had its principal place of business or carried on its business, the court was without jurisdiction to make the appointment.

The rule of pleading in criminal law should not be less exacting. It was held in *People v. Cohen*, 118 Cal. 74, [50 Pac. 20], that in an indictment for perjury it must be shown therein that the violated oath was administered by competent authority. In that case it was alleged that the oath was taken before a judge of the superior court sitting as a magistrate and was administered by the acting deputy county clerk. The judgment of conviction was reversed on the ground that the indictment failed to show competent authority to administer the oath for the reason that the judge sitting as a magistrate alone had such authority. The court said: "But, assuming that the magistrate may competently employ a clerk or other officer to perform this function, it is obvious that it should, to show authority in such officer, be alleged that the act was done at the direction of the magistrate. There is no such averment here except it be by mere inference or legal conclusion, and that is not sufficient. The fact being material, it must be directly averred to satisfy the rules of pleading, even in a civil action, and, *a fortiori*, in a criminal pleading."

In *People v. Terrill*, 127 Cal. 99, 100, [59 Pac. 836, 837], the court said: "It is an elementary principle of criminal law that the indictment or information must state that a crime has been committed, either by direct, positive averment in the language of the statute, or its equivalent, or by stating facts which show that such crime has been committed. In no case will the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence and if facts stated may or may not constitute a crime the presumption is that no crime is charged." The rule was much discussed in *People v. Schmitz*, 7 Cal. App. 330, 365, [15 L. R. A. (N. S.) 717, 94 Pac. 407, 419], and see opinion of supreme court on petition for hearing in that court. Not only is it essential that a crime be charged, but it must also appear that the court has jurisdiction to hear and determine the case.

There are three cases reported in which the prosecution was at the residence of the complainant: *In re Kowalsky*, 73 Cal. 120, 124, [14 Pac. 399]; *People v. Miller*, 122 Cal. 84, [54 Pac. 523]; *Older v. Superior Court*, 157 Cal. 770, [109 Pac.

478]; and in each case the residence of the party libeled was directly alleged to be in the county where the information was laid. The question at bar, therefore, was not involved. The Kowalsky and Older cases are cited by the attorney-general, but we find nothing in them to support his contention.

According to the theory of the prosecution the information would be sufficient if silent as to the residence of the prosecuting witness, or the place where the newspaper has its publication office. Suppose an information thus framed were laid in a county where the publication office was not situated and where the complainant did not reside. Upon *habeas corpus* the defendant could not find relief against the warrant of arrest, since, on the attorney-general's theory, the information would be sufficient on its face. Defendant would be compelled to appear and answer or demur. His demurrer would not avail him for the same reason that his discharge on *habeas corpus* must be denied. To do the only thing open to him he must plead not guilty. Obviously, to make out a case where the information is laid in a county other than that in which the newspaper has its publication office, the prosecution must prove that the complainant resided in such county at the time the alleged newspaper article was circulated therein. It is not for the defendant to make negative proof otherwise than to controvert such fact. The fact is to be established by the prosecution as an essential element of the power of the court to try the case. Otherwise the newspaper publisher is thrown back into the midst of the evil from the consequences of which the constitution was intended to protect him. True, he could not, in the case supposed, be legally convicted, but he could be put to the expense and annoyance of submitting to compulsory appearance in a county remote from the place of publication or remote from the residence of the complainant, whereas, if defendants' position be sound, as we think it is, he can have present and speedy relief by *habeas corpus* and the prosecution would be forced to seek the forum which the constitution has provided.

The district attorney is presumed to know the residence of the complaining witness. The defendant is not charged with such knowledge. The fact, as we have said, is essential to jurisdiction. Upon every principle or pleading this jurisdictional fact should be stated in the information.

Other questions are presented by the record, but as they may not arise, should there be a new trial, we refrain from noticing them.

The judgment and order are reversed.

Hart, J., and Burnett, J., concurred.

[Crim. No. 669. First Appellate District.—April 18, 1917.]

THE PEOPLE, Respondent, v. A. L. GIBSON, Appellant.

CRIMINAL LAW—EVIDENCE—DYING DECLARATIONS.—Dying declarations as competent evidence are restricted to the cause of death and the circumstances immediately attending it as part of the *res gestae*.

ID.—MURDER—ABORTION—STATEMENT OF DEFENDANT—EVIDENCE—DYING DECLARATION.—In a prosecution for murder resulting from the performance of an abortion, a statement made by the deceased about fifteen minutes before her death, that the defendant performed the operation on a stated date, and that he told her he had not lost a case in thirty years, followed by the declaration that she was dying, is admissible evidence as part of the *res gestae*, as it is fair to infer that the statement attributed to the defendant was made just before the operation.

ID.—CREDIBILITY OF WITNESSES—INSTRUCTION—APPLICABILITY OF TESTS TO TESTIMONY OF DEFENDANT.—An instruction which submits the testimony of the defendant, who testified in his own behalf, to the usual and general tests of credibility in common with that of the other witnesses, is not erroneous.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. W. A. Beasley, Judge.

The facts are stated in the opinion of the court.

H. A. Gabriel, and Geo. T. Kerr, for Appellant.

U. S. Webb, Attorney-General, John H. Riordan, Deputy Attorney-General, Arthur M. Free, District Attorney, and Archer Bowden, Deputy District Attorney, for Respondent.

KERRIGAN, J.—The defendant was convicted of murder in the second degree and sentenced to imprisonment in the

state prison for the term of twenty years. This appeal is from the judgment and from an order denying defendant's motion for a new trial.

On July 26, 1916, Mrs. Madeline C. Silveria, realizing that she was about to die as the result of an operation for abortion performed upon her by the defendant, made a dying declaration in which she stated that the defendant performed an abortion on her on July 4, 1916, and then added: "He told me he had not lost a case in thirty years, and now I am dying, now I am going to die." Within fifteen minutes after making the declaration she died. In support of the appeal defendant insists that the court erred in admitting in evidence that part of the dying woman's statement above quoted.

Dying declarations as competent evidence are restricted to the cause of death and the circumstances immediately attending it as part of the *res gestae*. (Code Civ. Proc., sec. 1870, subd. 4; *People v. Fong Ah Sing*, 64 Cal. 253, 256, [28 Pac. 233]; *People v. Lee Ah Chuck*, 66 Cal. 662, [6 Pac. 859].) From the record it is fair to infer that the statement attributed to the defendant was made just before the operation; but whether it was made then, or at the time of, or immediately following it, it certainly sheds some light on the occurrence, and was in fact a part of the *res gestae* of the operation; hence was admissible evidence. In the case of *People v. Cipolla*, 155 Cal. 224, [100 Pac. 252], the rule is given as follows (syllabus): "The dying declarations of the deceased, shown to have been made under circumstances of approaching death, were admissible and competent to cover all of the *res gestae*, including not only the actual facts of the assault and the circumstances surrounding it, but also the matters immediately antecedent thereto and having a direct causal connection with the assault, as well as acts immediately following the assault and so closely connected therewith as to form part of the occurrence. Under this, his statement is admissible to show that immediately after the murderous assault his body was carried and thrown into the river, and that he crawled out at about the place where he was thrown in, by means of brush at that place, of which he caught hold and climbed out, when he could go no further and lay down." In *People v. Brewer*, 19 Cal. App. 742, 745, [127 Pac. 808], testimony of a question put to the decedent and her answer thereto, to the effect that she was in good health at the time

of the operation, admitted as part of her dying declaration, related in truth, says the court, to the *res gestae* of the operation which resulted in her death, and for that reason was admissible. (See, also, *People v. Roach*, 17 Cal. 297; *People v. Linares*, 142 Cal. 17, [75 Pac. 308].)

Defendant also insists that the dying declaration of the deceased was not corroborated, and that therefore the judgment should be reversed. This position is based upon the provisions of section 1108 and section 1111 of the Penal Code. The former section provides that upon a prosecution for procuring an abortion the defendant cannot be convicted upon the testimony of the woman on whom the offense was committed unless she is corroborated by other evidence. Section 1111 provides that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. As to the first of these sections, it would seem to be a sufficient answer to the defendant's contention to say that this is not a prosecution for procuring an abortion—the defendant is charged with murder. As to section 1111, perhaps, suffice it to say that it is inapplicable to this case for the reason that the deceased could not well be regarded as an accomplice in her own death, but should rather be considered a victim of the offense. However that may be, and conceding, for the purpose of the argument only, that those sections—which were read to the jury—are applicable to the facts of this case, still the case cannot be reversed for the simple reason that the dying declaration is abundantly corroborated in every essential respect.

The defendant further insists that the court erred in giving the following instruction: "A witness is presumed to speak the truth. This presumption however may be rebutted by the manner in which he testifies, by the character of his testimony for truth, honesty, or integrity, or his motives, or by contradictory evidence. In determining the credit to be given to the testimony of a witness you may take into consideration the conduct, appearance, and manner of the witness while on the stand; his interest, if any, in the result of the trial; the motives which actuate such witness in testifying; the reasonableness or unreasonableness of his testimony; the candor or lack of candor with which he testifies; his relation or feeling toward the parties, and the probability or

improbability of his statements being true when considered with reference to all the other evidence, facts or circumstances in the case. A witness who willfully testifies falsely as to any material fact in giving his testimony is to be distrusted in other parts of his testimony. This instruction applies to the defendant as well as to all other witnesses."

We do not concur in appellant's criticism of this instruction. It does not single out and unfavorably comment on the defendant's testimony, as was done in the case of *People v. Maughs*, 149 Cal. 253, [86 Pac. 187], relied upon by the defendant. It merely submits the testimony of the defendant, who testified in his own behalf, to the usual and general tests of credibility in common with that of the other witnesses. It is not erroneous. (*State v. Wells*, 111 Mo. 533, [20 S. W. 232]; *State v. Bartlett*, 50 Or. 440, [126 Am. St. Rep. 751, 93 Pac. 243, 19 L. R. A. (N. S.) 802, 814]; *People v. Bartol*, 24 Cal. App. 659, 665, [142 Pac. 510].)

Other instructions are complained of, but we think the court's charge as a whole fairly covered the law applicable to the facts of the case.

We regret to have occasion in this case as in others to refer to the conduct of the district attorney in the trial of the cause. Our sense of justice is often shocked by the unfair questions and general demeanor of certain prosecuting officers; but in the case at bar, while certain actions of the district attorney deserve censure we are unable to say that there was such willful persistence in misconduct as to require a reversal of the judgment.

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 14, 1917, and the following opinion then rendered thereon:

THE COURT.—In denying the application for a hearing in this court after decision by the district court of appeal of the first appellate district we deem it proper to say:

First: In regard to the objection to the admission in evidence of that portion of a dying declaration detailing a state-

ment made by the defendant, a sufficient answer is contained in the statement of the district court of appeal substantially to the effect that it is a fair inference from the record that the statement attributed to the defendant was made just before the operation and as an inducement thereto, and that it therefore constitutes part of the *res gestae* of the operation. We do not desire to be understood as giving our approval to that portion of the opinion substantially stating that it could properly have been held a part of such *res gestae* if made subsequent to the operation.

Second: Upon the question of the corroboration of the dying declaration of deceased by other evidence, a sufficient answer to the objection of appellant in so far as the petition for hearing in this court is concerned is to be found in the conclusion of the district court of appeal "that the dying declaration is abundantly corroborated in every essential respect." Our order denying a hearing in this court is not to be taken as an intimation of our approval of that portion of the opinion which intimates that the deceased could not be regarded as an accomplice whose testimony required corroboration under the provisions of section 1111 of the Penal Code. Nor is our denial to be taken as intimating an opinion one way or the other on the question of the application of section 1108 of the Penal Code.

The application for a hearing is denied.

[Civ. No. 2036. First Appellate District.—April 19, 1917.]

H. LUFT, Appellant, v. KRIKOR H. ARAKELIAN et al., Respondents.

SPECIFIC PERFORMANCE—CONTRACT FOR PURCHASE OF REAL ESTATE—OSTENSIBLE AGENCY.—Where in entering into a contract for the purchase and sale of real estate the purchaser had no actual notice that the person with whom he was contracting was not the actual owner of the property, and did not at any time during his dealings with such person believe, or have cause to believe, that the latter was acting or purporting to act as the agent for the real owner, he cannot specifically enforce the contract against the owner on the theory of ostensible agency, since it is the rule that he who seeks to charge a supposed principal with the obligations resulting from the

acts and conduct of an alleged ostensible agent must show that he himself was cognizant of the facts which gave color to the alleged ostensible agency, and caused him to believe that the person he dealt with was acting in the capacity of an agent rather than as a principal.

Id.—ASSUMPTION OF OBLIGATIONS INCURRED BY AGENT—INSUFFICIENT RATIFICATION.—The fact that the owner, while repudiating the acts and conduct of the alleged agent, offered in one or two instances to assume some of the smaller and comparatively inconsequential obligations incurred by the alleged agent under similar contracts, did not constitute a ratification of the contract.

APPEAL from a judgment of the Superior Court of Fresno County. George E. Church, Judge.

The facts are stated in the opinion of the court.

Drew & Drew, for Appellant.

E. A. Williams, for Respondents.

LENNON, P. J.—In this action the plaintiff sought to compel the defendants to specifically perform a certain contract for the purchase and sale of real estate which had been entered into by the plaintiff with a third party named Klein who, it appears, was doing business under the name of the "New York Real Estate and Building Company."

The plaintiff's cause of action proceeded upon the theory that Klein was not the owner of the property purchased, but was the agent of the defendants in the transaction in suit. The trial court, however, found that Klein, when executing the contract in suit, was acting for himself and not as the agent of the defendants. This finding supports the judgment entered in favor of the defendants, which in turn finds ample support in the evidence adduced upon the whole case, which in substance is as follows: The defendants are husband and wife. The wife apparently had no relation to the contract in controversy, and was in no way interested in the property save as the wife of the defendant Krikor H. Arakelian. Therefore in this opinion we shall deal only with the husband, and shall refer to him as the defendant.

The real property which was the subject of the contract in suit, stood of record in the name of the defendant. On January 6, 1914, the plaintiff entered into an oral agreement

with Klein for the purchase of four residence lots at the price of three hundred dollars per lot, which lots were part of a tract of land situated in Fresno County, and known and designated upon an unrecorded map as "German Park." The record title to this tract at the time of the execution of the contract in suit stood in the name of the defendant. Incidentally the New York Real Estate and Building Company contracted, at the time of the execution of this contract, with the plaintiff to erect a dwelling-house on one of the purchased lots. By the terms of the sale ten per cent of the purchase price was to be paid down and the balance in specified installments. The plaintiff, in accordance with the terms of the sale, paid to Klein the sum of \$980, which left a balance of one hundred dollars due to Klein on the original agreement, but which it was stipulated was not to be paid to Klein until the dwelling-house had been erected. When the sum of \$980 had been paid to Klein he absconded without completing his contract, and the plaintiff thereupon tendered the balance of one hundred dollars due to the wife of the defendant. At the time the contract was entered into, Klein, under the name of the "New York Real Estate and Building Company," was advertising the German Park property for sale, and the plaintiff never knew of the defendant's connection with the property, and never had any dealings with him. The defendant, however, had knowledge of the fact that Klein was advertising the property for sale, and that he was doing so by reference to the unrecorded German Park map. But prior to the making of the contract of purchase and sale with the plaintiff, Klein had entered into a conditional contract of purchase and sale with the defendant of the entire tract of land comprising the so-called German Park at the agreed price of two thousand dollars per acre, or thirty-seven thousand five hundred dollars, payable under certain conditions and in specified installments. This conditional contract of sale provided, among other things, that if while complying with the conditions of the contract concerning the payment of the purchase price Klein sold any lots in the tract, the defendant would execute to him a deed to said lots. This contract was not recorded at the time the plaintiff entered into his contract with Klein. When Klein absconded, the defendant procured other lands belonging to him and adjoining the tract conditionally sold to Klein, to be platted and added to the map

known as German Park, and at the same time caused the name of the map to be changed to that of "Ara Park."

Counsel for plaintiff concedes that the evidence as above outlined would not have supported a finding that the relation of principal and agent actually existed between Klein and the defendant, but earnestly contends that it would have supported and should have compelled a finding of ostensible agency in Klein. This contention we think is disposed of by the fact that the evidence shows affirmatively that the plaintiff had no actual notice of the defendant's relation to the property, and does not show, nor tend to show, that the plaintiff at any time during his dealings with Klein believed or had cause to believe that the latter was acting or purporting to act as the agent for the defendant; and it is well settled that he who seeks to charge a supposed principal with the obligations resulting from the acts and conduct of an alleged ostensible agent must show that he himself was cognizant of the facts which gave color to the alleged ostensible agency, and caused him to believe that the person he dealt with was acting in the capacity of an agent rather than as a principal. (Civ. Code, sec. 2300; *Harris v. San Diego Flume Co.*, 87 Cal. 526, [25 Pac. 758]; *Rodgers v. Peckham*, 120 Cal. 238, [52 Pac. 483]; *Gosliner v. Grangers' Bank of California*, 124 Cal. 225, [56 Pac. 1029].)

The fact that the defendant, while repudiating the acts and conduct of Klein, offered in one or two instances to assume some of the smaller and comparatively inconsequential obligations incurred by Klein under similar contracts did not constitute a ratification of the plaintiff's contract with Klein.

The judgment appealed from is affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 18, 1917.

[Crim. No. 537. Second Appellate District.—April 19, 1917.]

THE PEOPLE, Respondent, v. R. L. STOCKTON, Appellant.

CRIMINAL LAW—MURDER—EVIDENCE—CONFESION—CURE OF ERROR.—

In a prosecution for the crime of murder the defendant is not prejudiced by the alleged erroneous admission in evidence over his objection of a purported confession made by him to the district attorney, where he voluntarily became a witness in his own behalf and as such witness testified that he had heard his confession read to the court, and that the facts were therein truly stated.

APPEAL from a judgment of the Superior Court of Kern County, and from an order denying a new trial. Howard A. Peairs, Judge.

The facts are stated in the opinion of the court.

W. C. Dorris, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

CONREY, P. J.—Defendant was convicted of the crime of murder in the first degree and sentenced to imprisonment for life. He appeals from the judgment and from an order denying his motion for a new trial.

The defendant having had a quarrel with one Brown, purchased a revolver and went out to look for Brown, whom he found in a saloon in the city of Bakersfield. One Leland Mull was standing at the bar next to Brown. The defendant fired in their direction, intending to hit Brown, but instead thereof hit and killed Mull.

It is urged by defendant's counsel in support of the appeal that the evidence in this case was not sufficient to warrant a conviction because (1) the defendant shot twice, while there is evidence that at least four shots were fired; (2) when he was shot the deceased fell in the direction opposite to that in which he would have fallen had the defendant fired the fatal shot. There is evidence from which the jury might have believed that at the time of the killing four shots were fired, but there is no testimony that at that time and place any shooting was done by any person other than the defendant. The evi-

dence clearly and convincingly tends to show that Mull was killed by the first shot. The evidence does not conclusively show that the deceased fell in a direction opposite to that in which he would have fallen had the defendant fired the fatal shot. A reading of the entire testimony convinces us that the evidence is amply sufficient to warrant the conviction.

The next point urged is that the court erred in admitting over defendant's objection a purported confession made by the defendant; also that the purported confession contained statements of facts not in the nature of a confession of guilt, and that the defendant was compelled to be a witness against himself. The so-called confession consisted of questions propounded by the district attorney and answers made by the defendant. James Price, a court reporter, was present and took down the statements in shorthand and afterward transcribed his notes. At the trial he testified to these facts and identified the document, stating that it was a correct transcript of the statement as made by the defendant, but did not directly testify to the contents thereof. It was then read to the jury by the district attorney. It is unnecessary to discuss the legal propositions presented by counsel, or the authorities in support thereof, under which he claims that this evidence was wrongfully received. The defendant voluntarily became a witness in his own behalf, and as such witness testified that he had heard his confession read to the court, and that the facts were therein truly stated. Assuming without deciding that there was error in the court's original ruling upon the objections, it is, as to any claim of prejudicial error, fully cured by this testimony of the defendant. We fail to find anything in the record to support the claim that defendant was compelled to testify against himself.

Finally it is claimed that the court erred in refusing to allow testimony to prove that shots were fired, other than two which were fired by the defendant. This point relates to questions asked of certain witnesses for the purpose of showing that a shot fired by the defendant after he stepped out of the saloon did not go through the door, but struck against a baseboard next to the bootblack stand on the outside of the building. There was no witness who saw the shooting that was done outside of the building, other than the defendant himself. He testified that he fired one shot while in the saloon, and that after he backed out of the door of the saloon he shot

again, but not toward the saloon. "Q. Where did you shoot when you were outside, Mr. Stockton? A. Well, sir; I shot on the sidewalk or near the bootblack stand." No testimony was introduced directly contradicting the statement that defendant fired a shot toward the bootblack stand. In accordance with a request made by the defendant, the jury was permitted to view the entire premises, both inside and outside of the saloon. They examined the bullet hole in the door, which according to the prosecution's theory was caused by a shot fired by the defendant after he backed out of the saloon, and which according to the defendant's theory was caused by a shot fired by some other person. They also examined the place where the defendant claimed that the second shot fired by him struck the bootblack stand. When the defendant was arrested, soon after the shooting took place, he had on his person a revolver in which two of the cartridges had been discharged. While this fact may be taken as corroboration of the defendant's testimony that he fired only two shots, it is not necessarily conclusive of the question. Neither is this matter of prime importance in determining the case against the defendant, in view of the fact to which we have referred, that the direct testimony points most strongly to the fact that Mull was killed by the first of the shots that were fired.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 18, 1917.

[Civ. No. 2323. Second Appellate District.—April 19, 1917.]

WILLIAM R. HAMILTON, Petitioner, v. WALTER MALLARD, as City Assessor of the City of Los Angeles, et al., Respondents.

PUBLIC OFFICE—PERFORMANCE OF DUTY BY DE FACTO OFFICER—MANDAMUS BY TAXPAYER.—A writ of mandate will not issue at the instance of a city taxpayer to compel an alleged *de jure* city assessor to perform the duties of such office, where the same are being performed by a county assessor under claim and color of right with the acquiescence of the city council and the city assessor *de jure*, as the question of the right to the office is one for litigation in a direct proceeding between the parties directly interested.

APPLICATION for a Writ of Mandate originally made to the District Court of Appeal for the Second Appellate District to compel the performance of the duties of city assessor.

The facts are stated in the opinion of the court.

J. R. Scott, and James, Smith & McCarthy, for Petitioner.

Albert Lee Stephens, City Attorney, and C. B. Penn, Deputy City Attorney, for Respondents.

SHAW, J.—This is an original proceeding instituted by petitioner as the owner of property in the city of Los Angeles for a writ of mandate to be directed to Walter Mallard, as city assessor of the city of Los Angeles, and to other respondents as members of the council of said city, requiring the latter to furnish Mallard, as such assessor, certain stationery and supplies mentioned in the petition, alleged to be necessary for his use in the performance of his duties as such assessor and for which he had made requisition, and commanding respondent Walter Mallard as such assessor to perform the duties of assessor of said city.

The proceeding grows out of the fact that, under and by virtue of an amendment to the charter of the city of Los Angeles purporting to authorize such action, the city council adopted an ordinance whereby it was provided that, beginning on the fifth day of March, 1917, the functions of the city of Los Angeles relating to the assessment of property for tax-

ation should be transferred to, assumed, and discharged by the officer of Los Angeles County performing similar functions in such county, except as therein provided, and that the office of city assessor be vacated and abolished; the effect of which was to transfer the functions of city assessor to the county assessor of Los Angeles County for performance. Thereafter the board of supervisors of Los Angeles County adopted a resolution approving such transfer, and assuming for and on behalf of said county the discharge and performance of such functions by the proper officer of the county, which officer, since the contrary is not made to appear, we must assume by virtue of such transfer and the assumption of such duties, has entered upon and is now engaged in the discharge thereof.

The theory upon which petitioner bases his claim to the issuance of the writ is the invalidity of the proceedings whereby the functions of the office of city assessor were transferred to the county assessor for performance and the office abolished. In view of our conclusion that upon the facts stated in the petition, to which a general demurrer was interposed, the writ of mandate prayed for should not issue, it will be unnecessary to discuss the several grounds upon which petitioner's attack is made upon the validity of the amendment to the charter pursuant to which the proceedings of the council in effecting the transfer were had and taken. If the office was abolished, then clearly, since Mallard could not be the incumbent of an office that had no existence, the writ would not lie. On the other hand, assuming the existence of the office as claimed by petitioner, and that Mallard is the *de jure* city assessor, who, as alleged, refuses to perform the functions of the office, which are in fact being exercised by another under color of right so to do, is petitioner entitled to the writ? The answer to the question depends upon whether such performance of duties by the county assessor constitutes him the *de facto* incumbent of the office. If such fact be made to appear, then petitioner, since the law "for grave reasons of public policy, holds valid the acts of such an officer" (*Morton v. Broderick*, 118 Cal. 474, 480, [50 Pac. 644]), is not concerned with the question as to the right of such county assessor to assess city property. "The lawful acts of an officer *de facto*, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of

office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it." (*Town of Susanville v. Long*, 144 Cal. 362, [77 Pac. 987].) While the writ will issue to compel the performance of official duty, it cannot, where there is a valid performance of such duty, be invoked to determine the disputed question as to which of two persons is entitled as of right to perform the duty. (*Fowler v. Brooks*, 188 Mass. 64, [3 Ann. Cas. 173, 74 N. E. 291].) That it will lie in a proper case at the suit of a taxpayer to compel the assessor to assess lands, admits of no doubt. (*People v. Shearer*, 30 Cal. 645; *Hyatt v. Allen*, 54 Cal. 353.) But where, as here, it appears that the duty of assessing property is being performed by one whose acts, if he be such *de facto* officer, are of the same validity as though exercised by the assessor *de jure*, how can a taxpayer be an aggrieved party or said to have any beneficial interest in the subject which can be affected? The sole inquiry, then, is not whether the proceedings which purport to abolish the office of city assessor and transfer its functions to the county assessor are valid, but, conceding them invalid, are the facts such as to constitute the person filling the office of county assessor the *de facto* city assessor? That he is such *de facto* officer, we think necessarily follows from his possession of the indicia of office and the fact that he is actually engaged in performing all the functions thereof, claiming so to do under color of right, with the acquiescence of the city council and the city assessor *de jure*. True, he does not hold himself out as being city assessor; but this, to our minds, is immaterial. It is the exercise of the functions of the office, not of right, but under claim and color of right, that gives the position of the county assessor its *de facto* character, rather than the name by which the office is designated. Conceding petitioner's right as a taxpayer to have a valid assessment made of all city property, nevertheless, since it appears such valid assessment is being made, he is in no position to insist upon the issuance of a writ of mandate to determine the legality of the proceedings under which the county assessor is engaged in the performance of the functions of the office. He is not concerned with the question of which of two persons purporting to act officially performs an act which, in either case, is equally free from objection. To issue the writ under such circumstances would be tantamount to permitting its use for

the purpose of determining, as between two adverse parties, the right and title to the office, for which purpose another proceeding is provided by statute. True, where the party is entitled to the relief sought, the writ will not be withheld in a proper case because of the fact that title to the office is incidentally involved. (*Morton v. Broderick*, 118 Cal. 480, [50 Pac. 644]; *McKannay v. Horton*, 151 Cal. 711, [121 Am. St. Rep. 146, 13 L. R. A. (N. S.) 661, 91 Pac. 598].) No facts are here disclosed, however, which bring the case within the exception to the general rule announced in those cases. Moreover, the writ of mandate does not issue as a matter of absolute right (*People v. Lieb*, 85 Ill. 484), and in the case at bar consideration should be given to the probable demoralization and disaster in the administration of the fiscal affairs of the city which might follow the granting of the application. If the proceedings for the transfer of the functions of the office are, as claimed, invalid, such question should be litigated in a direct proceeding, final as to parties directly interested, and not in a suit at the instance of a third party who, as it appears to us, has no beneficial interest in the matter.

The writ is denied.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 18, 1917.

[Civ. No. 1651. Second Appellate District.—April 19, 1917.]

CHARLOTTE WORTHLEY, Respondent, *v.* H. E. WORTHLEY, Appellant.

QUIETING TITLE—EXECUTION OF DEED—INCONSISTENT FINDINGS.—In an action to quiet title a finding that the plaintiff “executed” a deed to the property is inconsistent with a finding that it was understood that the deed should not be delivered until her last illness, as the term “executed” includes delivery under section 1933 of the Code of Civil Procedure.

Id.—DEED FROM MOTHER TO SON—FRAUDULENT REPRESENTATIONS—UNSUPPORTED FINDINGS.—A finding that a deed made by a mother to

her son was procured by the latter's false representations that the former should have a life estate in the property, and that she would not lose her interest therein, is not supported by her testimony that she delivered the deed because she was ill and afraid of him, where she also testified that he was to have the property after her death, and it appeared from other evidence that the son had contributed a part of the purchase price.

APPEAL from a judgment of the Superior Court of the County of Los Angeles, and from an order denying a new trial. John M. York, Judge.

The facts are stated in the opinion of the court.

E. Hardesty, for Appellant.

George S. Richardson, for Respondent.

JAMES, J.—Appeal by the defendant from a judgment in favor of the plaintiff, and from an order denying a motion for new trial. This is an action by plaintiff against the defendant, who is her son, by which a decree was sought quieting a fee title in the plaintiff as to a certain lot of land located in the city of Los Angeles. It was alleged that plaintiff, in March, 1911, made a deed whereby it was proposed to pass title to her son, but that it was understood that the deed was not to be delivered until the plaintiff's last sickness. It was further alleged that in October, 1912, the defendant demanded of the plaintiff that she deliver the deed to him, and that in order to induce her to make delivery he "offered and represented that she would have a life estate in said property, and that she would not lose her interest in said property." The further allegation appears to the effect that the representations made were false and fraudulent and made with the intent and for the purpose of defrauding the plaintiff; and that in June, 1913, contrary to the representations so made, the defendant ejected the plaintiff from the dwelling-house on the premises and compelled her "to live in a shed on the rear of said premises." "That said defendant now threatens to sell and transfer said property to another and thereby deprive plaintiff of her right in said property." The court made findings in accordance with the allegations of the complaint as to the circumstances under which the delivery

of the deed was made, and further determined that the plaintiff held a life estate in the property. The finding, which follows one of the allegations of the complaint, that in the month of March, 1911, the plaintiff "executed her deed in the above described property to the defendant H. E. Worthley," is inconsistent with the further finding, which also agrees with the allegation in that portion of the complaint referred to, "that it was understood and agreed between said parties that the said deed should not be delivered until plaintiff's last sickness." The term "executed" includes delivery. (Code Civ. Proc., sec. 1933.) There was no testimony given by the plaintiff which is sufficient to support the finding that the deed was obtained by reason of the alleged false representations and promises. The plaintiff testified that at the time she delivered the deed (which had been prepared some time prior thereto), the defendant, her son, demanded the deed of her, said that he would have it; that she was ill at the time and afraid of him, and that when she delivered it she was "afraid" that she would not have her home left to her. The trial judge, as shown by the reporter's transcript, appreciated this condition of the evidence, when he said, addressing plaintiff's counsel: ". . . She says she was afraid of him. If she had confidence in him, she would never be afraid of him." Under the evidence it was quite clear that a considerable part of the purchase price of the lot had been contributed by the defendant, although the title to same had been taken in the name of his mother. The mother admitted that the intention was that her son should have the property at her demise, but that she was to have "a home" while she lived. The circumstances of the case were hardly such as would indicate that the mother was making a gift of the entire estate to her son, and we think the circumstances were not such as to impress upon the transaction the presumption of fraud. (*Soberanes v. Soberanes*, 97 Cal. 140, [31 Pac. 910].) The chief obstacle which we find in the way of affirming the judgment is that the evidence, as addressed to the main charge of fraud relied upon, does not support the allegations in the complaint nor the findings made by the court.

We have not had the aid of any briefs from either party, but from an examination of the record we are convinced that a new trial should be had.

The judgment and order are reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1899. Second Appellate District.—April 19, 1917.]

M. G. DOOLITTLE, Respondent, v. SAVAGE TIRE COMPANY (a Corporation), Appellant.

CONTRACT—COMPENSATION FOR USE OF AUTOMOBILE—NEW ARRANGEMENT—INSUFFICIENT PROOF OF TERMINATION OF ORIGINAL CONTRACT.—In an action to recover compensation for the use of plaintiff's automobile in connection with his work as a salesman for defendant, the original agreement to pay the reasonable value of such use is not shown to have been terminated by the evidence of the plaintiff of a new arrangement subsequently made concerning the use of the machine, in the absence of anything in the record disclosing the terms of such new arrangement.

ID.—EVIDENCE—BY-LAW OF CORPORATION—MANNER OF FIXING COMPENSATION OF EMPLOYEES.—In such an action a by-law of the defendant corporation limiting the manner in which the compensation of employees should be fixed, is inadmissible, where it is not shown that plaintiff had notice or knowledge of such by-law at the time the contract was made.

APPEAL from a judgment of the Superior Court of Los Angeles County. J. W. Curtis, Judge presiding.

The facts are stated in the opinion of the court.

Gibson, Dunne & Crutcher, Titus & Davin, and Jas. A. Gibson, Jr., for Appellant.

Earl Curtis Peck, for Respondent.

CONREY, P. J.—The judgment awarded to the plaintiff the sum of one thousand dollars as compensation for the use of an automobile pursuant to an alleged agreement between plaintiff and defendant. The defendant appeals from the judgment.

The principal grounds upon which appellant claims a reversal are that the evidence is insufficient to sustain the following findings: (1) That the plaintiff used his automobile in the business of the defendant pursuant to the agreement sued on, from on or about the first day of July, 1913, to and including the thirty-first day of August, 1914; (2) That the reasonable value of the use of the automobile was the sum of one thousand dollars.

The plaintiff was a salesman employed in selling tires for the defendant, and was the owner of an automobile. At a date not exactly established, but which was between the first and middle of August, 1913, the sales manager of the defendant made an oral agreement in its behalf with the plaintiff which, in substance, was that the plaintiff should use his automobile in connection with his work as a salesman, and that the defendant would pay the reasonable value of such use. The plaintiff did use his automobile exclusively in the business of the defendant from that time until about the end of August, 1914. There is evidence tending to establish the fact that this arrangement between the sales manager and the plaintiff was made known to and was approved by the president and general manager of the defendant. The evidence further shows that the reasonable value of the use of the automobile, if plaintiff paid for the gasoline used by him, was one hundred dollars per month; if the defendant paid for the gasoline, it was at least \$75 per month. The plaintiff did pay for his own gasoline until March 1, 1914. Thereafter the gasoline expense was paid by the defendant.

Fairly construed, the brief for appellant concedes that the plaintiff is entitled to compensation under the contract sued on for the time from the middle of August, 1913, until March 1, 1914. This would justify the judgment at least to the extent of \$650. Appellant contends, however, that the contract was terminated on March 1, 1914, and therefore that the recovery cannot include compensation for the use of the automobile after that date.

Evidence was received concerning an agreement said to have been made about March 1, 1914, between plaintiff and defendant, whereby the defendant purchased the plaintiff's automobile, and that thereafter it was used as the defendant's machine. But all of this evidence was afterward stricken from the record by consent of the parties. Notwithstanding such stipulation, appellant relies upon a general statement made by the plaintiff in his testimony that on March 1st a new arrangement was made concerning the use of this automobile, and argues therefrom that the contract made in August was thereby terminated. In our opinion such conclusion does not follow. As the record stands, we do not know what were the terms of the supposed new arrangement, and we cannot say that they were sufficient to put an end to

the existing contract. The fact that the plaintiff continued in the employ of the defendant as salesman, and continued to use his automobile in that business as he had used it before, with the single exception that from that time the defendant paid for the gasoline used, tends to support plaintiff's claim that he was continuing to use the automobile in that business under the agreement that he should be paid the reasonable value of such use. At the rate of \$75 per month this would have amounted to \$450. It follows that the evidence is sufficient to support the court's finding that the reasonable value of the use of the machine, for the entire period included in the findings amounted to one thousand dollars.

Appellant further complains that the court erred in excluding from the evidence a by-law of the defendant which limited the manner in which the compensation of employees should be fixed. This by-law stated that: "The compensation for all employees may be fixed by the executive committee or by the general manager, but no employment for a longer period than one month shall be valid unless agreed upon in writing and approved by the directors or the executive committee." We think that the by-law was properly excluded. The compensation of the plaintiff as an employee was his salary, about which there appears to have been no dispute. At least it is not involved in this case. The contract for the use of plaintiff's automobile stands on the same foundation as if it had been made with any automobile owner to obtain the use of such machine in the company's business. Appellant claims that the by-law was admissible for the additional reason that the plaintiff was a stockholder of the defendant corporation, and therefore bound to take notice of its by-laws. In fact, the evidence shows that the plaintiff was a stockholder of the defendant corporation at the time when this action was tried in the superior court, but not that he was such stockholder when the contract was made. Since the contract related to a matter connected with the ordinary course of business of the corporation, and was made by or with the consent of the general manager, and the corporation received the benefit of the contract thus made, it should not be permitted to take advantage of a limitation (if such there was) of the general manager's authority, without evidence that the plaintiff knew or had notice thereof.

The judgment is affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 2042. First Appellate District.—April 20, 1917.]

PETRONELLA CANER, Appellant, v. OWNERS REALTY COMPANY (a Corporation), Respondent.

CONTRACT—BREACH OF COVENANT TO GRADE STREETS—INSUFFICIENT COMPLAINT.—In an action for damages for breach of a covenant of a contract to grade certain streets, in which time was of the essence, but no time for performance fixed, the complaint is fatally defective and the action barred by the statute of limitations, where it appears upon the face of the complaint that the contract was not made within four years prior to the institution of the action, and no averment contained therein that a demand for performance of the covenant was ever made.

ID.—DEMAND OF PERFORMANCE—WHEN NECESSARY.—Where no time is specified for the doing of an act other than the payment of money, a demand for performance is necessary to put the promisor in default.

ID.—TIME FOR DEMAND FOR PERFORMANCE.—Where a demand for performance is essential to the creation of a cause of action it must be made within a reasonable time, which is the period of time prescribed by the statute of limitations for the outlawry of the action.

ID.—INDEFINITE TIME OF PERFORMANCE—STATUTE OF LIMITATIONS.—Where in a contract the time within which an act is to be performed is either indefinite or not specified, the statute of limitations commences to run against an action for failure to perform such an obligation at the expiration of a reasonable time.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. A. E. Graupner, Judge.

The facts are stated in the opinion of the court.

J. A. Olson, for Appellant.

Jordon & Brann, for Respondent.

LENNON, P. J.—Upon this appeal from a judgment entered in favor of the defendant following an order of the trial court sustaining a demurrer to the plaintiff's first amended complaint, it appears from said complaint that the plaintiff individually and as the assignee of twenty-two other persons sought in twenty-three separately stated causes of action to recover damages from the defendant for the alleged breach of

covenant of a contract to grade streets in a certain tract of land in San Mateo County known as the "Ocean Shore tract," in which plaintiff and her assignors had purchased lots. The complaint also purported to plead twenty-three causes of action upon the same covenant for specific performance. To all of these causes of action the defendant demurred upon the ground that none of them stated facts sufficient to constitute a cause of action, and that each of them was barred by the provisions of sections 337 and 343 of the Code of Civil Procedure.

Upon the oral argument it was conceded by counsel for plaintiff that the demurrer was well taken in so far as it was directed against the several causes of action attempted to be pleaded for specific performance.

The covenant of the contract pleaded and relied upon to support the plaintiff's claim of damages for its breach is as follows: "The sellers [defendant] guarantee to grade all the streets in the Ocean Shore tract at their expense. Time is acknowledged to be of the essence of this contract. These covenants shall be binding on the parties to this contract, their heirs, successors and assigns." It affirmatively appears upon the face of the complaint that the several contracts in suit were not made within four years prior to the institution of the action; it is alleged that each and all of them were made at different times varying from five to seven years before the complaint was filed. It will be noted that the covenant in question does not specify, and the plaintiff's complaint does not allege nor attempt to allege, the time within which the defendant was to grade the streets in the tract wherein plaintiff and her assignors had purchased lots. Furthermore, the complaint is devoid of an allegation that the plaintiff or her assignors ever demanded that the defendant perform the said covenant. Where no time is specified for the doing of an act other than the payment of money it is the rule of law that a demand for performance is necessary in order to put the promisor in default. (9 Am. & Eng. Ency. of Law, 200, 201.) The reason for the rule in this behalf is to give the promisor an opportunity to perform before being subjected to the inconvenience and expense of litigation. (1 Cor. Jur. 979.) No time having been fixed by the covenant under consideration for the performance of the obligation thereof, and the complaint failing to allege a demand upon

the defendant for performance, it is clear that the complaint, in so far as the several causes of action for damages are concerned, is fatally defective—when measured by the foregoing rule. Moreover, such a demand in addition to being essential to the creation of a cause of action, was necessary to toll the statute of limitations. In this behalf it is the rule, well settled we think, that where in a contract the time within which an act is to be performed is either indefinite or not specified it may and must be performed within a reasonable time; and ordinarily the statute of limitations commences to run against an action for a failure to perform such an obligation at the expiration of a reasonable time. (*Williams v. Bergin*, 116 Cal. 56, [47 Pac. 877].) And again, where, as in the present case, a demand for performance is essential to the creation of a cause of action it must be made within a reasonable time, which, it has been held, is the period of time prescribed by the statute of limitations for the outlawry of the action. (*Meherin v. San Francisco Produce Exchange*, 117 Cal. 215, [48 Pac. 1074].) An action upon any written contract founded upon an instrument in writing executed within the state is barred within four years (Code Civ. Proc., sec. 337); and as no demand was made within four years after the contracts in suit were executed all of the causes of action arising therefrom, and pleaded in the plaintiff's complaint, were under the rule last above stated barred by the statute of limitations.

It follows from what we have said that the demurrer to the plaintiff's complaint was well taken and rightly sustained.

The judgment is affirmed.

Richards, J., and Kerrigan, J., concurred.

88 Cal. App.—81

[Civ. No. 1914. Second Appellate District.—April 20, 1917.]

IRA J. FRANCIS, Respondent, v. INDEPENDENT ELECTRICAL SUPPLY COMPANY (a Corporation), Appellant.

ACTION ON PROMISSORY NOTE—DEFENSE OF PAYMENT—AMENDMENT OF ANSWER AT TRIAL—DISCRETION.—Where in an action on a promissory note the answer failed to deny that the note was unpaid, it will be presumed that the court properly exercised its discretion in refusing the defendant leave at the close of the plaintiff's case to amend the answer by alleging payment, in the absence of any showing of facts excusing the failure to allege the same in the first instance, or of any affidavit or other matter of record from which could be inferred a reasonable probability that the defense could have been sustained.

ID.—ASSIGNMENT OF CORPORATION NOTE—AUTHORITY OF SALES AGENT.
In an action on an assigned note, testimony of the agent who made the assignment on behalf of the corporation payee that he was the sales agent of the corporation, and as such had control of and possession of all books of account and evidences of indebtedness and all other matters in connection with the corporation's business in the southern end of the state, is sufficient to support the inference that the agent was authorized to make the assignment, although another person was president and general manager of the corporation.

ID.—CORPORATION LAW—GENERAL MANAGER OF ALL BUSINESS—APPOINTMENT OF DEPARTMENT MANAGER—AUTHORITY OF.—The fact that a corporation has a general manager whose supervision extends to all of its business, does not exclude its right to vest in another agent the powers of a general manager representing the corporation in the conduct of some department of its business. The superintendent or manager of such department stands in the same relation to the matters pertaining to his department as does the general superintendent or general manager to the general affairs of the company.

APPEAL from a judgment of the Superior Court of the County of Los Angeles, and from an order denying a new trial. Leslie R. Hewitt, Judge.

The facts are stated in the opinion of the court.

Hyman Schwartz, for Appellant.

Oscar C. Mueller, Alfred Wright, and Wm. W. Lovett, Jr., for Respondent.

CONREY, P. J.—Appeal by the defendant from the judgment and from an order denying its motion for a new trial.

The action is upon a promissory note made by the defendant to a corporation; the complaint alleging that before the commencement of the action the note was assigned by the payee to the plaintiff. The answer to the complaint did not deny that the note was unpaid. After all of the plaintiff's evidence had been introduced, the defendant for the first time applied for permission to allege payment. This request was denied. It is now claimed that the court's refusal to allow the proposed amendment was an abuse of discretion by reason whereof the defendant is entitled to a new trial. No facts were shown excusing the defendant's failure to put an allegation of payment into its original answer. The application for leave to amend was not accompanied by affidavits, nor by any other matter of record from which one can infer a reasonable probability that the defense could have been sustained. Therefore we will presume that the court properly exercised its discretion in that matter.

The only other ground of appeal urged on behalf of appellant is that the evidence is insufficient to support the finding that the note had been assigned and transferred to the plaintiff. The point made is that the evidence failed to show that the assignment was made by a person who had been given the authority, or had been in the habit of signing contracts on behalf of his company, or indorsing and assigning its negotiable paper. The testimony of the agent who made the assignment on behalf of the corporation was as follows: "I am sales agent of John A. Roeblings' Sons Company of California and as sales agent have control of and possession of all books of account and the evidences of indebtedness and all other matters in connection with the business of that corporation in the southern end of California." It further appeared that another person was president and general manager of the corporation. We think that this evidence was sufficient to support the inference that the agent was authorized to make the assignment. The fact that a corporation has a general manager whose supervision extends to all of its business, does not exclude its right to vest in another agent the powers of a general manager representing the corporation in the conduct of some department of its business. The

superintendent or manager of such department stands in the same relation to the matters pertaining to his department as does the general superintendent or general manager to the general affairs of the company. For authorities to this effect see note in 38 L. R. A. (N. S.) 1135.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1635. Third Appellate District.—April 21, 1917.]

MORRIS BROOKE, Respondent, v. T. L. QUIGLEY, Appellant.

CONTRACT—COMMISSION FOR PURCHASING LAND—FRACTIONAL INTEREST IN PROPERTY—TRUST—SPECIFIC PERFORMANCE.—An agent who consummated a purchase of a tract of land under an agreement that he should receive as his commission a one-sixth interest in the property, cannot, where the purchaser makes a sale of a portion of the property, which portion was of the value of one-half of the whole tract, have a trust declared in his favor in an undivided one-third interest in the part remaining unsold, or specific performance decreed to that effect, as under such an agreement he is only entitled to a decree for a one-sixth undivided interest of the whole tract.

APPEAL from a judgment of the Superior Court of Sutter County. K. S. Mahon, Judge.

The facts are stated in the opinion of the court.

M. E. Sanborn, and Butler & Swisler, for Appellant.

W. H. Carlin, for Respondent.

BURNETT, J.—The suit was for the recovery of a certain interest in real property which was alleged to be held in trust by the defendant for the plaintiff. The cause of action is based upon a contract between the parties whereby respondent acted as the agent for appellant in the purchase of a tract of land from one Edward A. Noyes under an agreement that he should receive as his commission a one-sixth in-

terest in said real property. The contract is set out in the complaint, and it is further alleged that in accordance therewith respondent secured the sale, and the deed was made to appellant as the sole grantee; that subsequently appellant sold a portion of said real estate, and that said portion was of the value of one-half of the whole tract. The prayer was for judgment decreeing respondent to be the owner of an undivided one-third interest in the part remaining unsold, and that appellant held it in trust for respondent, and that he be required to perform specifically his contract and execute a deed to respondent of the one-third interest. The answer set up a failure on plaintiff's part to perform his contract, concealment of knowledge and information from defendant by plaintiff, and also misrepresentations by the agent to the principal, constituting a violation of his duties and obligations as such agent. It was also alleged that the contract was not sufficiently specific, comprehensive, or definite to admit of specific performance, and that the alleged services did not constitute a fair, just, and adequate consideration or any consideration whatever for plaintiff's demand. By counterclaim and cross-complaint defendant also sought to recover the sum of \$2,167.60 which he had paid to plaintiff before he had discovered the said violation of his duties as agent and the failure to render the services contracted for. It may be stated that this payment was made by reason of a certain reduction in the cash payment required of appellant at the time of the execution of the deed to him. The court's conclusion harmonized with the view of plaintiff, and its judgment determined and decreed "that plaintiff is the owner in fee and entitled to the possession of an undivided $\frac{25338}{114795}$ interest in and to those certain tracts or parcels of land situate and being in the county of Sutter (describing them). Subject, however, to the payment by plaintiff of the sum of \$21,166.66 on or before the first day of January, 1921, with interest thereon from the date of the entry of this decree at six per cent per annum, the same being a portion of the last payment required to be made in and by that certain promissory note executed by defendant T. L. Quigley to E. A. Noyes and secured by a mortgage of record." Then follows a copy of said note and the judgment continues: "It is further here ordered, adjudged and decreed that within ten days from the date of the rendition and entry of this decree, the defendant T. L.

Quigley execute his said trust by the execution and delivery to plaintiff of a good and sufficient deed of grant, granting and transferring to him said $\frac{25333}{114795}$ interest in and to said lands and premises hereinbefore described subject to the payment of said sum of \$21,166.66 on or before the first day of January, 1921, with interest from the date of the rendition and entry of this decree at six per cent per annum as hereinbefore set forth; and that in the event of the failure or refusal of said defendant T. L. Quigley to execute said deed within the time and in the form and substance as herein directed, the sheriff of the county of Sutter, state of California, is hereby appointed for such purpose and directed to make, acknowledge, execute and deliver said deed in the place and stead of said defendant, T. L. Quigley."

We now proceed to the consideration of the principal contentions of appellant for a reversal of the judgment.

While appellant presents various points for our determination, he declares in his brief that the primary reason why appellant resists the demands of respondent is because of the knowledge obtained by appellant that respondent, while pretending otherwise, in fact failed to render the services as broker which in law and good conscience he was bound to render before he could rightfully claim compensation. In fact, appellant testified to the agreement substantially as did respondent, and declared that he intended to execute it until he learned "that he had not delivered or given me the service I expected, that I was paying for." The particular remissness of the agent is designated as "fraudulent concealment," "nonperformance and delay," "positive acts of fraud," and "misrepresentations." Under the first are specified: "(a) He did not inform appellant that he had knowledge of the Phipps-Beere option; (b) He did not inform appellant of the terms of that option or the price thereunder at which the land could be purchased, *viz.*, \$28 per acre; (c) he did not inform appellant during the time he was pretending to act as the confidential agent of appellant, that he at the same time was acting as the agent for Noyes and endeavoring to obtain for the land the highest possible price," and that he advised Noyes to insist upon a cash payment of twenty-five thousand dollars instead of twelve thousand five hundred dollars which Noyes had consented to accept until a flaw in the title was removed.

In the second category are enumerated his omission to avail himself of the opportunity to purchase the land at the price of \$28 per acre, through said Phipps-Beere option, and his failure to submit to Noyes the various offers for the land made by appellant. The "positive acts of fraud" are covered by the foregoing, and the "misrepresentations" relate to a letter and telegram sent by respondent to appellant on December 29, 1912, to the effect that the net price for the land was \$30 per acre and that it had never been offered for less.

The constant and undivided fidelity of the agent to the interest of the principal is, of course, demanded by the provisions of the statute, the decisions of the courts, and the recognized principles of honorable dealing, and if we had to accept the recital of appellant as embodying the established facts of the case we should not hesitate to say that respondent was recreant to his trust and was not entitled to any consideration in a court of justice. But the foundation of appellant's claim is found in the testimony offered in his own behalf. It may be admitted that, from the record, his showing appears to be not destitute of persuasive force, but the apparently inculpatory circumstances are negatived by the denials and explanations of the plaintiff himself. As far as it was inconsistent with the evidence of appellant the court undoubtedly accepted and acted upon the testimony of respondent, and we can do no less under the familiar rule. In view of the insistent assertions of appellant as to these important circumstances, we have been at pains to read carefully the entire transcript, and we find therein legal justification for the conclusion of the trial court that respondent acted in good faith in his dealings with appellant. We need not quote from the record, but we deem it sufficient to say that respondent testified that he knew of said option and told Quigley about it, but was informed that it called for \$30 per acre, that he was told by Noyes that the land had never been offered for less, that he did not advise Noyes to insist upon a payment of twenty-five thousand dollars instead of twelve thousand five hundred dollars, that he did submit to Noyes the various offers made by appellant, and that he did not know at any time while acting as the agent of appellant that the land could be bought for less than what it was purchased for. As to any effort made to sell the property to another party, he gave an explanation capable of reconciliation with

an honest attitude toward appellant. He declared that Mr. Quigley said to him: "I may do business down here, but if you have any other prospect of selling that property and doing business with Mr. Noyes go ahead and do business." Respondent testified that he had an arrangement with Mr. Quigley to that effect, and he did the best he could for him, but he had the privilege of disposing of the property elsewhere if the opportunity was offered. It seems that by agreement with Noyes the price for any other purchaser was one hundred and seventy-five thousand dollars, but the owner and respondent were anxious to favor appellant, and if a sale were made to him it would be for about twenty-five thousand dollars less. Respondent gives his reasons for believing that this scheme was in the interest of Quigley and we cannot say that his conduct was inconsistent with good faith. He was, no doubt, anxious to obtain a commission, but in that respect he was probably like the average individual, and it cannot be said that he was not justified in what he did. Mr. Quigley was himself a real estate agent and had, no doubt, a fellow-feeling for the craft and he was willing to give Mr. Brooke as much leeway as possible. Indeed, appellant seemed to rely entirely upon his own judgment as to the value of the land, he determined what he would pay for it, and his engagement was with Brooke that the latter would endeavor to secure it for him at that price but with the privilege of selling it for more to another purchaser.

It is contended with much learning that the theory of a trust upon which respondent relies is utterly untenable. The criticism begins with the complaint itself. After setting out the agreement between the parties, as we have hereinbefore stated, and the negotiations culminating in a sale, carried on by plaintiff with Mr. Noyes, the complaint proceeds, "and thereafter in accordance with said negotiations carried on on the part of plaintiff in accordance with said agreement a deed of grant, bargain, and sale was, on or about the 5th day of December, 1913, executed by said Edward A. Noyes to said defendant T. L. Quigley, granting and transferring to said Quigley the above-described lands and premises. Shortly before the execution and delivery of said deed, plaintiff learned that the deed was to be executed by said Noyes and he requested and demanded of said defendant Quigley that in the execution of said deed, plaintiff should be named as a

grantee therein to the extent of an undivided one-sixth interest, and said defendant Quigley as grantee therein to the extent of the remaining five-sixths interest therein in accordance with said agreement as aforesaid; that, however, defendant Quigley refused to permit plaintiff to be named in said deed," etc. It is declared that the complaint is thus inconsistent and self-destructive. The particular point is that in one breath plaintiff claims that the conveyance to Quigley was in accordance with the agreement between the parties and, in the next, that it was in violation of said agreement. In other words, assuming that a trust existed, it is alleged both that it was and that it was not executed. We think, however, that this criticism involves rather a matter of uncertainty than of vital infirmity. Respondent admits that the complaint was hurriedly and somewhat carelessly drawn, and it is contended that what was meant is that the sale was secured through the efforts of plaintiff in accordance with the agreement of plaintiff and defendant, but that the deed was executed contrary to said agreement in the respect indicated. There was no special demurrer and the case was tried upon the theory that the cause of action was properly set forth, and defendant certainly suffered no prejudice by reason of said defective phraseology.

Appellant, however, with more confidence, apparently, urges the objection that the evidence fails to disclose any trust at all that can be legally enforced. There is an interesting discussion in the brief of the various kinds of trusts that are recognized by the authorities, and special attention is devoted to the consideration of a *resulting trust* of which respondent contends this is an example. Therein are recited the different conditions upon and according to which such a trust may arise, and it is claimed that only one of these conditions could possibly apply here, and that is "when a purchaser of an estate pays the purchase money or some portion thereof and takes the title in the name of a third person." But it is insisted that such is not the case here for the reason that no part of the consideration for the conveyance passed from respondent to Noyes, the owner of the property. In support of the position certain authorities are cited, including Pomeroy's *Equity Jurisprudence*, section 1037, *Woodside v. Hewel*, 109 Cal. 481, 485, [42 Pac. 152], and *Los Angeles etc. Dev. Co. v. Occidental Oil Co.*, 144 Cal. 528, 534, [78 Pac. 25]. In the

first it is said: "The fundamental idea of such a trust is that equity considers that the beneficial interest follows the consideration and attaches to the party from whom the consideration comes. But in order that this effect may be produced it is absolutely indispensable that the payment should be actually made by the beneficiary B or that an absolute obligation to pay should be incurred by him as a part of the original transaction of purchase, at or before the time of the conveyance."

In the Woodside case, *supra*, the doctrine is therein stated: "The resulting trust, not within the statute of frauds, and which may be shown without writing, is when the purchase is made with the proper moneys of the *cestui que trust*, and the deed not taken in his name. The trust results from the original transaction at the time it takes place, and at no other time, and it is founded on the actual payment of money, and on no other ground."

And in the Los Angeles case, *supra*, it was declared: "Efforts as the promoter or agent of the parties, and the traveling or other expense incurred in bringing about this transfer, cannot be held to perform even a part of the consideration for the transfer."

It is therefore urged, in opposition to the claim that respondent's share of the consideration was his efforts in bringing about the conveyance, that, since no part of this passed to the grantor, or furnished any part of the consideration for the conveyance, it cannot be regarded as sufficient to create a resulting trust. However, we are not greatly concerned with the definition of words or in what category the alleged trust falls, but the vital inquiry, of course, is whether there was evidence of the creation of a legal obligation on the part of appellant to convey said one-sixth interest to respondent.

The written correspondence between the parties would seem to answer this inquiry. We can see no reason why it may not be held that thereby what is known as an express trust was created within the purview of sections 852 and 857 of the Civil Code. (*Estate of Hinckley*, 58 Cal. 457; *Hellman v. McWilliams*, 70 Cal. 449, [11 Pac. 659], and other decisions.) In the Hinckley case it was said: "The code does not in terms declare the distinction between express and implied or resulting trusts. But section 857 declares that 'express trusts' in relation to real property may be created for certain purposes.

Express trusts are put in opposition to those which are implied or resulting—the latter being such as exist 'by operation of law,' and the former such as are created or declared by instrument in writing." It is true that if the said letter of December 23d were the only writing in relation to the matter it could hardly be held sufficiently definite and comprehensive to be enforced, but its deficiency was supplied in the other correspondence between the parties. There can be no mistake as to what was intended. Indeed, as we have seen, appellant on the witness-stand admitted the agreement as claimed by respondent, but sought to justify his refusal to convey by reason of said misconduct.

But apart from the foregoing, the action may be upheld as one for specific performance. As to this appellant complains that there is no allegation in the complaint that the consideration was equitable and adequate. The issue, however, was tendered by the answer, evidence was received in relation to it, and it was found by the court in favor of plaintiff. It is immaterial, therefore, whether we regard the action as one for specific performance or to enforce a trust. In either event there is sufficient foundation for a judgment in favor of plaintiff.

But regarded in either aspect, the particular judgment rendered, in our opinion, was not warranted by the facts. If a trust existed it reached the whole tract and fastened itself upon every portion of it. It was a trust to convey an undivided one-sixth interest in and to said land. It could not be executed by the conveyance of a larger proportion of a part of the land, at least without the consent of the defendant. The same would be true as to specific performance. Plaintiff must rely upon his contract for the conveyance of one-sixth of the entire estate. As to the part disposed of by appellant, respondent must rely upon a judgment for damages. This would not require, of course, a separate action but can be included in the same complaint. The matter is treated at length in *Lathrop v. Bampton*, 31 Cal. 17, 22, [89 Am. Dec. 141], wherein is quoted with approval the following from Mr. Justice Lewis in *Thompson's Appeal*, 22 Pa. St. 16, 17: "Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the *cestui que trust*. No change of its state and form can divest it of such

trust. So long as it can be identified either as the original property of the *cestui que trust*, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a *bona fide* purchaser for a valuable consideration without notice. But the right of pursuing it fails when the means of ascertainment fail." In that case all the trust property was disposed of, but the principle is the same where only a part of it remains. Here one thousand one hundred acres of the specific property covered by the trust is gone "and nothing is left to the *cestui que trust* except a naked claim for damages generally, on account of the breach," as far as that particular tract is concerned.

In section 843 of Perry on Trusts it is said: "If the *cestui que trust* is unable to trace the trust fund into the hands of other persons or into the hands of third persons other than *bona fide* holders for value, or into other property in the hands of the trustee, or if he elects not to do so, he may proceed against the trustee personally."

It may be said, also, as before suggested, that if we regard the case as one for specific performance, to allow plaintiff to recover one-fourth of the residue of the property instead of one-sixth of the whole tract, would be to make for the parties a contract that was never in their minds. (*Grey v. Tubbs*, 43 Cal. 359; *Magee v. McManus*, 70 Cal. 553, [12 Pac. 451].)

Another consideration is worth mentioning: Under plaintiff's theory he was entitled to a deed of one-sixth of the real property subject to his proportion of the indebtedness. As we have seen, there was a cash payment and a note and mortgage given for the balance. The note called for the payment of \$98,465.55, with interest at the rate of six per cent per annum. As to the principal, it was provided that \$10,465.55 should be paid on or before ninety days from the date of the note, ten thousand dollars on or before January 20, 1916, and the balance, to wit, the sum of seventy-eight thousand dollars, on or before January 1, 1921. According to the decree plaintiff was awarded the fee and the use and possession of nearly one-fourth of the residue of the property without being required to make any payment until the 1st of January, 1921. He could thus enjoy the use of the property for nearly six years and then abandon it without the payment of anything. That he was favored in this manner arises from the circum-

stance that appellant had sold a portion of it and been in the exclusive possession of the residue ever since the purchase. The judgment may not have been inequitable, but we are left to conjecture as to the extent of the damage done to plaintiff by his exclusion from the enjoyment of his portion of the property. We think there should be an accounting between the parties that it may be determined how much is due plaintiff for the said sale, and how much for the use of the property, and a decree entered for the residue in accordance with the terms of the contract, if the court is still of the opinion that plaintiff should recover.

The judgment is reversed.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 378. Third Appellate District.—April 21, 1917.]

THE PEOPLE, Respondent, v. M. D. NOLAN, Appellant.

CRIMINAL LAW—TIME OF COMMISSION OF OFFENSE—CONSTRUCTION OF STIPULATION OF COUNSEL.—In a prosecution for selling alcoholic liquors in no-license territory, a stipulation entered into by counsel at the close of the people's case that the district mentioned in the indictment is no-license territory is sufficient to establish that the district was no-license territory at the time of the commission of the offense.

ID.—INTERPRETATION OF STIPULATIONS.—The rules applicable to the construction of contracts generally govern the courts in their interpretation of stipulations, and such a construction will be placed upon them as will render them reasonable and just to both parties, and a construction that would make them frivolous and ineffectual avoided, if possible.

APPEAL from a judgment of the Superior Court of Mendocino County, and from an order denying a new trial. J. Q. White, Judge.

The facts are stated in the opinion of the court.

J. C. Hurley, and Lilburn I. Gibson, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—Defendant was convicted of the crime of selling alcoholic liquor in no-license territory, upon indictment found by the grand jury of Mendocino County. He appeals from the judgment of conviction and from the order denying his motion for a new trial. The charging part of the indictment is that defendant, "within the boundaries of the Fourth Supervisor District of the said county of Mendocino, and outside the corporate limits of any city or town," at the hour of 8 o'clock P. M., on April 17, 1916, "did then and there willfully and unlawfully sell, furnish, and distribute alcoholic liquor to one Emil Baroni said supervisor district being then and there no-license territory under the law of the state of California, contrary," etc.

The prosecution introduced several witnesses whose testimony tended to establish the truth of the charge and, when about to close for the people, the following appears in the record: "Mr. McCowen (after consulting with attorneys for defendant): It is stipulated that Mendocino City is in the fourth supervisor district, that it is not an incorporated town and that the fourth supervisor district is no-license territory. Mr. Gibson (attorney for defendant): Yes."

The only point now made on the appeal is that there is no evidence showing that the said district was no-license territory on April 17, 1916, the date of the alleged sale of liquor as charged in the indictment. The indictment was found on May 6, 1916, and the trial took place October 10, 1916, at which time the above stipulation was made.

Defendant cites *People v. Cavallini*, 29 Cal. App. 526, [156 Pac. 73]. In that case the point was raised on demurrer to the information that it failed to allege the existence of the ordinance at the time the selling of the liquor was alleged to have occurred.

In his opening statement to the jury the district attorney, addressing himself to defendant's attorney, said: "I suppose, Mr. Schino, you will admit that the fourth supervisor district on the date alleged in the information was 'dry territory?'" Mr. Schino: No, sir, if your Honor please, we desire to make a formal objection in that respect." After a colloquy between the district attorney, defendant's attorney and the judge, the following appears: "The Court: Then, gentlemen of the jury, it is stipulated by and between respective counsel representing the people and the defendant that the fourth supervisor

district of Madera county is 'no-license' territory. That will be taken by you as a fact in the case. Mr. Schino: That is on the 30th day of September, 1914. The Court: Yes, I have no reference to anything else except as to the date of this information, that is on the 30th of September, 1914, the fourth supervisor district of the county of Madera was in 'no-license territory.' " It was in view of this state of the record that the following was said by the court in reviewing the case: "The stipulation went no further than an admission that, on September 30, 1914, the district was 'no-license territory,' and this admission was subject to defendant's objection that evidence showing a violation of the local option law was not admissible, for the reason that the information failed to state a public offense." It was held, correctly, we still think, that it was necessary to allege in the information that at the time the offense was committed the district was "no-license" territory. The averment in the present indictment meets that requirement.

The only question, then, is, Can we say that the stipulation was intended to refer to the averment in the indictment that at the time the offense was committed the district mentioned was "no-license territory"?

We must assume that the district attorney knew that it was necessary to establish the truth of the material averments of the indictment, and that one of such averments was the existence of the no-license ordinance at the time of the alleged offense. He made his proofs as to the alleged violation of the ordinance by defendant, and then turned to defendant's attorney to counsel with him as to proving the remaining facts and was met by the stipulation.

"The rules applicable to the construction of contracts generally govern the courts in their interpretation of stipulations, and thus stipulations will receive a reasonable construction with a view to effecting the intent of the parties." (36 Cyc., p. 1291.) "A construction will be placed upon the stipulation which will render it reasonable and just to both parties rather than unreasonable and unjust; and a construction will be avoided, if possible, which will make the stipulation frivolous or ineffectual." (20 Am. & Eng. Ency. Pl. 658.) The stipulation, as interpreted by defendant, might not make it frivolous, but would make it wholly ineffectual for any purpose. "Where the language of one party may be understood in more

senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the other party." (Ibid., p. 660; and this is the rule stated in section 1649 of the Civil Code.) It is also stated, among other rules, that the stipulation is to be interpreted with reference to its subject matter, in the light of the surrounding circumstances, including the state of the pleadings, the allegations therein and the attitude of the parties in respect of the issues. (20 Am. & Eng. Ency. Pl., p. 659.) There were but two principal issues presented—first, did defendant sell intoxicating liquor in the fourth supervisor district of said county as charged? Second, was the district at that time no-license territory? Proof was made of the first issue and we think it reasonable to assume that the parties understood the stipulation to cover the second issue. It can hardly be doubted that the district attorney had reason to suppose it was so understood by defendant's attorney.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1665. Third Appellate District.—April 21, 1917.]

R. E. HOUGHTON, Plaintiff and Appellant, v. KERN VALLEY BANK et al., Defendants and Appellants; NG HON KIM, Intervener and Respondent.

TAXATION — ASSESSMENT — INSUFFICIENT DESCRIPTION — CONFLICTING MAPS.—An assessment of lots for the purposes of taxation as lots 1, 2, and 3 in block 132 of the town of Bakersfield, without reference to any map, is void for insufficient description, where it is shown that there is but one block 132, and three recorded maps of the town, upon each of which the lots are delineated in different parts of the block.

ID.—PURPOSES OF DESCRIPTION.—The purposes to be subserved by the description are to enable the owner to discharge his land from the lien of the assessment by paying the same, and also, in case the land shall be sold to satisfy the lien, that bidders may know what land is offered for sale, and that the purchaser may receive a sufficient conveyance.

APPEAL from a judgment of the Superior Court of Kern County, and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Octave G. Du Py, for Plaintiff and Appellant.

Rowen Irwin, for Kern Valley Bank, Defendant and Appellant.

C. Brower, *in pro. per.*, Defendant and Appellant.

J. W. P. Laird, and Rowen Irwin, for H. A. Blodget, Defendant and Appellant.

Olney & Olney, for Mills College, Assignee, etc., Defendant and Appellant.

W. S. Allen, and Fred E. Borton, for Thos. H. Brown, Defendant and Appellant.

Emmet H. Wilson, and G. C. De Garmo, for Leslie R. Hewitt, Assignee, etc., Defendant and Appellant.

Nancy Ella Houghton, *in pro. per.*, Defendant and Appellant.

Chas. N. Sears, for Intervener and Respondent.

CHIPMAN, P. J.—The action originally was in partition and involved numerous different lots of land owned by many different persons. Respondent, Ng Hon Kim, filed a complaint in intervention in the nature of an action to quiet title, alleging ownership in fee of certain three of the lots situated in the city of Bakersfield, Kern County. Intervener had judgment in his favor from which plaintiff and defendants appealed to the supreme court.

The judgment and order denying motion for a new trial in favor of intervener were reversed. (157 Cal. 289, [107 Pac. 113].) The complaint described the property as lots 1, 2, and 3, block 132, in the Baker Homestead Tract, according to the map of said tract filed in the office of the county recorder of Kern County, state of California, on the third day of April, 1889. Intervener claimed title under delinquent tax

sales. The complaint in intervention described the property as "Lots one, two, and three in block one hundred and thirty-two situate in the city of Bakersfield, county of Kern, state of California," but made no reference to any map. We quote from the opinion: "No map showing the location of any lots or blocks was introduced in evidence. Under the decisions of this court there seems to be no escape from the conclusion that the assessment is *prima facie* invalid." The assessment-book was offered in evidence and, under the heading "Description of Property," showed entries as follows: "In the town of Bakersfield, lot 1, 2, 3," and under the heading "Block" the figures "132," appeared. The theory upon which the decision proceeded was "that a description of this kind is of such a nature as to indicate that the property can ordinarily be located only by reference to some map or plat, and no such map or plat being referred to as being in existence, the description is *prima facie* insufficient. There is no presumption, in the absence of such a reference, that there is such a map in existence." In remanding the case the court said: "Upon a new trial it will, of course, be competent for the intervener to offer evidence for the purpose of showing that the description was sufficient. To this end he may show, if it be the fact, that there was of record at the time of the assessment a map by the aid of which the description of the lots in question would serve to fully and completely identify and locate them."

At the second trial the evidence submitted at the former trial was introduced by stipulation, and is in the transcript on page 31 down to the middle of page 66, at which point the transcript shows as follows: "Thereupon the trial proceeded and the intervener offered in evidence a map entitled Map of the 'Baker Homestead Tract,' which was indorsed: 'Filed in the office of the County Recorder of Kern County, California, this 3rd day of April, 1889, N. R. Packard, County Recorder,' and the same was admitted in evidence." The plaintiff and defendants thereupon, "with a view of showing that there were two maps of block 132 in Bakersfield, and that the lots in the blocks were not described in the same manner, nor did they cover the same land, and with a view of showing that there existed an uncertainty in the description of the land that was carried into the assessment, offered in evidence two maps of Bakersfield." The transcript is as follows:

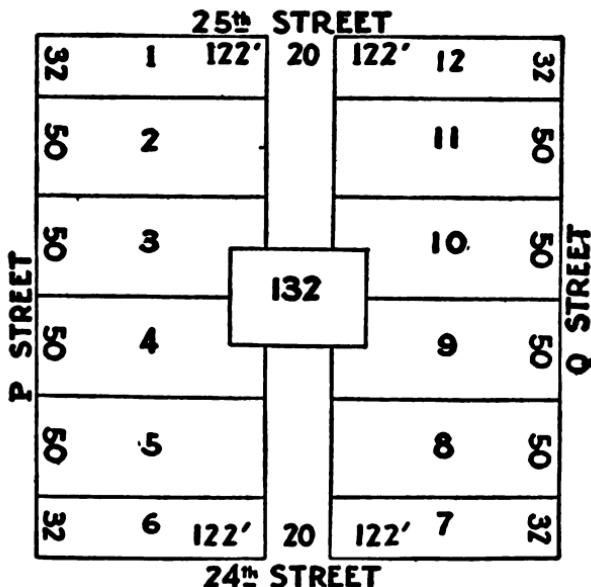
"Thereupon the plaintiff and defendants offered in evidence a map entitled 'Map of Bakersfield, Kern County, Cal.' and

indorsed: 'Filed in the office of the Recorder of Kern County, Cal., August 17th, 1875, F. W. Craig, Recorder,' and the same was admitted in evidence.

"The plaintiff and defendants also offered in evidence a map entitled 'Map of Bakersfield and Sumner, Kern County, California,' and indorsed 'Filed in the office of the County Recorder of Kern County, June 5th, A. D. 1888, N. R. Packard, County Recorder,' and the same was admitted in evidence."

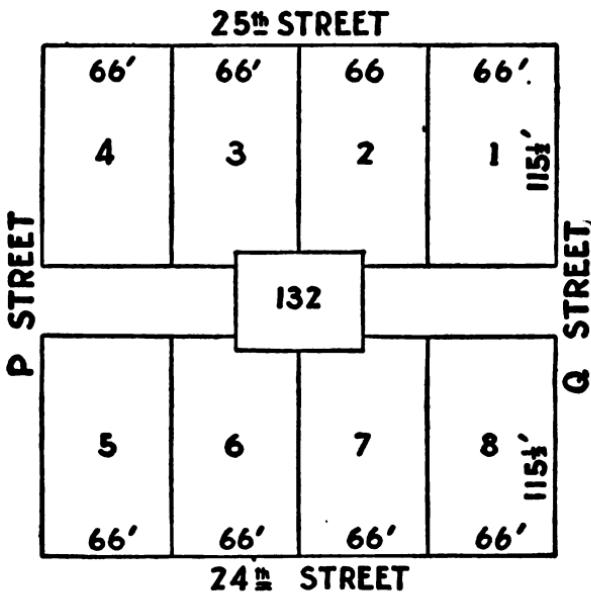
These maps were by stipulation omitted from the transcript with an understanding that either party might, if necessary, produce them for inspection by the reviewing court. Appellants have presented in their opening brief, at page 13, a diagram which shows without controversy the situation of the lots in question on the three different maps, as follows:

Block 132, Bakersfield, showing division into lots as delineated on map offered in evidence by the intervener, respondent herein, entitled "Map of Baker Homestead Tract, Bakersfield," filed in the office of the County Recorder, Kern County, California, this 3d day of April, 1889, N. R. Packard, County Recorder.



Block 132, Bakersfield, showing division into lots as delineated on the two maps offered in evidence by the plaintiff and

defendants, appellants herein, entitled Map of Bakersfield, Kern County, California, the first being indorsed, Filed in the office of County Recorder of Kern County, Cal., August 17, 1875, F. W. Craig, Recorder; the second map being indorsed, Filed in the office of Kern County Recorder, June 5, 1889, N. R. Packard, County Recorder.



An inspection of these maps will show that block 132 is the same size in all three of them—264 feet square; that, on the map of Baker Homestead Tract block 132 is divided into twelve lots fronting east and west on P and Q Streets with an alley between of 20 feet in width; that lots 1, 2, and 3 front on P Street with a depth of 122 feet and, with half of the alley, would make one-fourth of the block in the northwest corner. The other maps show that the block is surrounded by the same streets but that the lots front north and south on Twenty-fourth and Twenty-fifth Streets, and the block is divided into eight lots. Lots 1, 2 and 3 on those maps have a uniform width frontage of 66 feet and a depth of 115 1/2 feet, which would be three-eighths of the block, less half of an alley, and are in the northeast corner of the block and have a frontage of 198 feet on Twenty-fifth and 115 1/2 on Q Street. On the face of the maps it would seem impossible to identify the lots in question.

There was but little oral testimony which we give in its entirety, as follows:

"Mr. Sears: What is your name? A. J. M. Jameson.

"Q. What office, if any, do you hold in this county? A. County assessor.

"Q. How long have you been assessor of this county? A. Since 1899.

"Q. You have the supervision over the assessment of property in this county? A. Yes, sir.

"Q. I will ask you if you know anything as to this map, August 17, 1875? A. Well, I have seen it before.

"Q. Will you observe lot 132 upon this map? A. Yes, sir.

"Q. Now I will show you another map here sought to be offered in evidence by the plaintiff which shows to have been filed in the recorder's office on the 5th day of June, 1888. Have you ever seen that map? A. I think so.

"Q. Known as Bakersfield and Sumner? A. I think I have.

"Q. Will you observe as to block 132 upon that map of Bakersfield? Now, in making your assessments, do you know as to whether or not these maps are in use, or whether or not they have been abandoned in making the assessment of property in this city, and in this county? A. Well, it would take a comparison of a map I think to tell that. In making my assessment, I have always gone by the official map at the time the assessment was made, and I could not say as to that.

"Q. In making your assessments in this case, and involving the property involved in this case, being lots 1, 2 and 3, block 132, the assessment shows that the same was assessed at that time, at the time of the assessment as shown in this case, to the city of Bakersfield. I will ask you as to whether or not at the time of the date of those maps there, there was any city of Bakersfield? A. How is that?

"Q. Whether there was any city of Bakersfield, known as the city of Bakersfield. A. It was not incorporated—that is, I don't know—there was an old incorporation a good many years ago, I don't know anything about that, but my memory is that there was an old incorporation a good many years ago, which fell through with; but the later incorporation came later.

"Mr. Houghton: Of which the record is the best evidence of when the city was incorporated, disincorporated and reincorporated.

"The Court: That is true.

"Mr. Sears: The maps themselves merely show 'Bakersfield' and 'Bakersfield and Sumner,' while the assessment says 'Lots 1, 2 and 3 in Block 132, in the City of Bakersfield.'

"Q. Now, what has been your custom and procedure in making assessments in this city as to the descriptions as in this case, for instance, in property in the city of Bakersfield?

"Mr. Houghton: We object to it as incompetent what the custom has been, the question is, what has been done in this case.

"Mr. Sears: I think I said 'in this case.'

"Mr. Houghton: The record speaks for itself as to what has been done in regard to the assessments.

"The Court: He can tell how he made this assessment if you want him to. A man might have a custom and it might be wrong, and they would not be bound by it.

"Mr. Sears: The language in this case is 'Evidence showing the system of assessment.'

"The Court: You can show that.

"Mr. Sears: What has been the system of assessments of property in this city? A. What do you mean, in descriptions, in describing?

"Q. Yes, as in this case, the property is situated in the city of Bakersfield? A. I describe it by lots and blocks.

"Q. Have you found that that has been generally sufficient so that parties may identify the property?

"Mr. Houghton: Object to it as irrelevant, incompetent, and immaterial.

"The Court: The objection is sustained.

"Mr. Sears: Note an exception.

"Q. Now, in making the assessments in this case, as 'Lots 1, 2 and 3, in Block 132,' if there were another map covering the same, what do you do? A. Another map covering the same property?

"Q. The same block for instance. A. You mean if there was a duplicate block 132 in the city of Bakersfield?

"Q. Yes, sir. A. If there was a duplicate block in the city of Bakersfield, it would be necessary to designate it, in my opinion, as of a certain tract.

"Q. Now, in assessing the property here described as 'Lots 1, 2 and 3, in Block 132,' and it appeared that that was part of the Baker Homestead Tract, has it been the general system of assessing property then, as Lots 1, 2 and 3, in Block 132

of the Baker Homestead Tract? A. No, because there is only one 132 in the city of Bakersfield. I think a few instances where people took the pains to write in 'Baker Homestead Tract' in giving the statement in that that description would probably be carried into the roll from the statement, but in an instance where a person gave in lots 3 and 4 or any other lots in block 132, the description of 'Block 132' I considered sufficient for the description of the property, because there is only one block 132 in the city of Bakersfield.

"Q. There is at this time only one block 132 in the city of Bakersfield, and that is in the Baker Homestead Tract? A. Yes, sir.

"Mr. Sears: Take the witness.

"Mr. Houghton: That is all."

The assessment-book of the property showed as follows: "Unknown Owners—In Town of Bakersfield—Lots one, two, three, Block 132, Value \$115.00. Total tax, \$1.90. School tax, 29 cents."

In all the instruments relating to the assessment, and in all subsequent conveyances, this description is followed and in none of them is there any reference to a map. It thus appears that there were, at the time these lots were assessed, three maps of record of the town of Bakersfield—one entitled "Baker Homestead Tract," one entitled "Map of Bakersfield," and one entitled "Bakersfield and Sumner," both of the latter having been filed before the first one above mentioned. The most that can be said of the testimony of the assessor is that in the assessment he described the property by "lots and blocks"; that it has not been the general system of assessing these lots as of the Baker Homestead Tract, "because," as the assessor stated, "there is only one 132 in the city of Bakersfield." He testified: "I think in a few instances where people took the pains to write in 'Baker Homestead Tract' in giving the statement," that description would probably be carried into the roll, but where a person gave in "lots in block 132 the description of 'block 132' I considered sufficient for the description of the property, because there is only one block 132 in the city of Bakersfield. Q. There is at this time only one block 132 in the city of Bakersfield, and that is the Baker Homestead Tract? A. Yes, sir." It is not disputed that these three maps relate to the same lots and block and the assessor expressed the opinion that "if there was a

duplicate block in the city of Bakersfield, it would be necessary to designate it as of a certain tract." The witness testified: "In making my assessment, I have always gone by the official map at the time the assessment was made," but he could not say whether the maps of 1875 and 1888 were in use when he made his assessment, and he did not state which map was the official map. When the case was remanded it went back with the statement that intervener "may show, if it be the fact, that there was of record at the time of the assessment [the assessment was made in 1896] a map by the aid of which the description of the lots in question would serve to fully and completely identify and locate them."

In the case of *Baird v. Monroe*, 150 Cal. 560, [89 Pac. 352], a case cited with approval by the court when the present case was decided, the question of the sufficiency of the description was involved where a party was claiming under a tax title. In discussing the use of a map for identification of the property, the court said: "It was, however, permissible to show, in aid of this description, that it was in fact sufficient to identify the land, and, in this behalf, to show the recorded map of such Pellissier tract, designating with certainty the property referred to in the assessment. If by such evidence it was made to appear that there was such a recorded map, and only one such map, or, if more than one, no difference therein so far as the assessed property was concerned, the evidence was sufficient to sustain a conclusion that the assessment sufficiently identified the property. The trial court had the right to assume, in the absence of a showing to the contrary by the person assailing the description, that there was but one Pellissier tract in the county of Los Angeles, and that this tract and the extent of its boundaries were well known by that name. (*People v. Leet*, 23 Cal. 161.)" The court then quoted from *Best v. Wohlford*, 144 Cal. 733, [78 Pac. 293], as follows: "Parol evidence will not be admitted to help out a defective description, or to show the intention with which it was made, or to resolve an ambiguity in its terms. . . . If reference is made to a map, the map thereby becomes a part of the description, and may be read in evidence to identify the land, by showing that it is delineated thereon according to the recital; and although it is not competent to show that any particular map was intended, if none is referred to, yet if it can be shown that there is only one map of a tract which

includes the lot in controversy, upon which this lot is delineated or designated, and that that map is well known and generally accepted as authentic, it may be received in evidence as tending to identify the land before the court." (See *Furrey v. Lautz*, 162 Cal. 397, [122 Pac. 1073]; *Campbell v. Shafer*, 162 Cal. 206, 207, [121 Pac. 737]; *McLauchlan v. Bonyngue*, 15 Cal. App. 239, 240, [114 Pac. 798].)

There was no evidence that these lots were assessed in accordance with any existing system of numbering lots and blocks as shown by but one map, nor is there evidence that the lots delineated on all the maps introduced are the same and embrace the same land. The maps, in our opinion, add to the uncertainty of the description in the assessment rather than "to fully and completely identify and locate them." Bearing in mind that there is but one block 132 in the city of Bakersfield, and that all three of these maps refer to that and no other block, it is plain enough that lots 1, 2, and 3 as delineated on the 1889 map are in a different part of the block and do not embrace all the land referred to by lots 1, 2, and 3 in the other maps. "The purposes to be subserved by the description," said the court, in *Best v. Wohlford*, 144 Cal. 733, [78 Pac. 293], "are to enable the owner to discharge his land from the lien of the assessment by paying the same; and also, in case the land shall be sold to satisfy the lien, that bidders may know what land is offered for sale, and that the purchaser may receive a sufficient conveyance. The assessment becomes a lien only upon the land which is described in the assessment-book, and it is therefore essential that such description be sufficiently definite to inform the owner whether any of his land is burdened by the lien. The description must be such that the land claimed by virtue of the deed can be identified or located upon the ground by means thereof."

The judgment rested upon the finding of the trial court—"That the said property was duly assessed by the county assessor of Kern County, in the year 1896, for the year 1896." This finding is challenged on the ground "that the description of the land in said assessment was not sufficient and on account of the want of such description the assessment was void." We think that this finding is not sustained by the evidence.

The judgment and order are, therefore, reversed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 2037. First Appellate District.—April 24, 1917.]

ANNIE HILLYER et al., Appellants, v. W. W. J. HYNES, as Administrator, etc., Respondent.

CONSTRUCTIVE TRUST—BREACH OF PROMISE TO CONVEY REAL PROPERTY.

Where a wife being severely ill and not expecting to live makes a deed of gift of real property to her husband upon his express oral promise that he would in turn execute a deed of gift of the property to a niece of the former husband of the grantor and place the same in escrow to be delivered upon his death, his failure to perform his promise impresses the property with a constructive trust in favor of the niece.

Id.—ACTION TO ENFORCE PROMISE—STATUTE OF LIMITATIONS.—An action to enforce such a promise is one to recover real property and is therefore subject to the five year limitation provided by section 318 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Daniel C. Deasy, Judge.

The facts are stated in the opinion of the court.

Stafford & Stafford, and W. M. Stafford, for Appellants.

Cullinan & Hickey, for Respondent.

KERRIGAN, J.—This is an appeal by the plaintiffs from a judgment in favor of the defendant and from an order denying their motion for a new trial.

The complaint alleges that on the twenty-seventh day of September, 1909, Anna Flanigan Romoser was the owner of the real property here in controversy; that shortly before that date, being severely ill and not expecting to live, she entered into an arrangement with her husband, Henry Romoser, whereby she was to execute and deliver to him a deed of gift of said real property, and he in turn was to execute a like deed conveying the property to Catherine Meyers, a niece of Mrs. Romoser's former husband, and place the same in escrow, to be delivered upon his death; that accordingly Mrs. Romoser executed her deed to Henry Romoser, and that he continued to own the property to the

time of his death; that while he made and signed the promised deed of gift to said niece he never actually delivered it to her nor in escrow for her, without, however, ever repudiating his agreement so to do. This failure of Romoser to keep his agreement is charged in the complaint as fraudulent; and it then proceeds to allege that he died intestate on January 24, 1914, and that the defendant is the administrator of his estate; that Catherine Meyers died intestate on December 28, 1910, leaving as her only heirs the plaintiffs. The prayer of the complaint in part is that the defendant be declared to hold the property in trust for plaintiffs, and that he be required to convey the property to them, and that their title be quieted as against said defendant, administrator of the estate of Henry Romoser.

All the material allegations of the complaint are denied in the answer; and in addition the defendant alleges that the plaintiffs' cause of action is barred by subdivision 4 of section 338 of the Code of Civil Procedure, by subdivision 1 of section 339, and by section 343 of said code.

In addition to finding generally for the defendant the trial court also found that plaintiffs' cause of action was barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure, as pleaded.

From the evidence it appears without dispute that Mrs. Romoser died in March, 1910; that on September 27, 1909, being very ill she sent for her attorney, and informed him that she desired to make a conveyance of the property in controversy; that as she had acquired it from her first husband, Lawrence Flanigan, she thought it only fair to give the same to Mrs. Catherine Meyers, a niece and only living relative of said Lawrence Flanigan; but that she also believed it was her duty to her present husband—who was old and without income—to reserve for him a life estate in the property. She directed her attorney to draw a deed which would carry into effect these desires. It was accordingly drawn, and when presented to her for execution it transpired that since giving the above instructions she had been advised by one Father Casey that it would be better for her to make a deed of gift of the property to Henry Romoser, and have him make a like deed to Mrs. Meyers, placing the latter in escrow with Father Casey, to be delivered to the grantee upon Henry Romoser's death. Her attorney expressed his

disapproval of this method of carrying out her desires; nevertheless when she learned that it was legally unobjectionable she instructed him to pursue it. Accordingly a deed of gift conveying the property from Mrs. Romoser to her husband was made and delivered to him with the distinct understanding and promise by Henry Romoser that he would make a deed to the property in favor of Mrs. Meyers. At the same time the attorney requested Romoser to call at his office for the purpose of executing this deed. This he did about a month later, but no delivery of it was made, either to the grantee or in escrow for her, and the record does not disclose what became of it.

Henry Romoser died on January 2, 1914, predeceased by Mrs. Meyers, without having delivered, either to her or in escrow for her, the promised deed.

Being husband and wife, Henry Romoser and Anna Flanigan Romoser occupied a confidential relation toward each other; and whatever may have been his intention at the time Mrs. Romoser made said conveyance of property to him he received it upon his express oral promise that he would in turn execute a deed to Mrs. Meyers and place the same in escrow. His failure to do so was a betrayal of her confidence; it was a violation of trust, and, under the authorities in this state, impressed the property with a constructive trust in favor of Catherine Meyers or her heirs which a court of equity will enforce. (*Brison v. Brison*, 90 Cal. 323, [27 Pac. 186]; *Dimond v. Sanderson*, 103 Cal. 97, 102, [37 Pac. 189].)

In the former case the court decided two propositions: (a) If a party, by means of a parol promise made without any intention of performing it, obtains an absolute deed without consideration, it is a case of actual fraud. (b) If a party by means of such parol promise to reconvey obtains an absolute deed to real property without consideration from one who stands in a confidential relation, the violation of the promise is constructive fraud, even if at the time it was made there was an intention to perform it.

In the case of *Jones v. Jones*, 140 Cal. 587, 590, [74 Pac. 143, 144], the court said: "Where a grantee and grantor of land stand in a fiduciary relation to each other—as husband and wife for example, and the deed is executed without consideration other than the promise expressed or implied of the grantee to hold the land for the purpose of carrying out an

express trust in favor of the grantor, which is not put in writing, and is therefore invalid as an express trust in land, the confidence which induced the transaction having presumably arisen from the fiduciary relations, the violation by the trustee of the terms of the parol agreement as to the express trust constitutes a constructive fraud, makes the grantee an involuntary trustee of the land for the use of the grantor, and gives the grantor the right to have the deed declared void and to a decree that the land is the property of the grantor, notwithstanding the execution of the deed."

In the case of *Cooney v. Glynn*, 157 Cal. 583, [108 Pac. 506], it is said: "It has been established by a number of decisions in this state that where confidential relations exist between two parties, and one of them executes a conveyance of real estate to the other upon a parol promise by the other that he will hold it for the benefit of the grantor, or for the benefit of some third person in whom the grantor is interested, there being no other consideration for the conveyance, a trust arises by operation of law in favor of the grantor, or in favor of the third person for whom the property is to be held. It is the violation of the parol promise which constitutes the fraud upon which the trust arises."

The evidence in the case at bar is not only uncontradicted, but it is clear and convincing that Henry Romoser accepted the conveyance of the property from his wife with the distinct oral agreement that he would in turn make a conveyance of the same to Catherine Meyers and place the deed in escrow, to be delivered to her upon his death, and the finding to the contrary therefor cannot be sustained.

The only other point in the case worthy of more than passing notice is the one as to the statute of limitations. As before stated, this action was commenced within five years, but after the expiration of four years, after the deed was made and delivered by Mrs. Romoser to her husband, at which time the latter ought to have taken steps to carry out his part of the agreement by which he acquired an interest in the property. The plaintiffs, neither in the complaint nor in the evidence introduced by them, attempted to bring their case within the provisions of subdivision 4 of section 338 of the Code of Civil Procedure, which provides that an action grounded in fraud or mistake must be brought within three years after the discovery by the aggrieved party of the facts

constituting the fraud or mistake. And assuming that this is an action to declare and enforce a constructive trust (*Jones v. Jones*, 140 Cal. 587, 590, [74 Pac. 143]), and that it is consequently, as to the period within which it may be brought, governed by section 343 of said code (*Norton v. Bassett*, 154 Cal. 411, [129 Am. St. Rep. 162, 97 Pac. 894]), to the effect that an action for relief not otherwise provided for must be commenced within four years after the cause of action shall have accrued, still we think that the statute has not operated in this case for the reason that the time could not be held to have commenced to run until Catherine Meyers had notice of the transaction, and it appears from the record that she had no such notice until about March 4, 1910, just after the death of Mrs. Romoser, at which time the surviving husband in effect recognized the trust, and stated that upon his death the property was to go to her. We think, however, that while the main ground of the action is constructive fraud, and that one of its purposes is to enforce a trust, in its final purpose it is an action to recover the title and possession of real property, and is therefore subject to the provisions of section 318 of the Code of Civil Procedure. Accordingly the five-year period prescribed by that section is the only limitation which can be applied in bar of plaintiffs' cause of action. (*Murphy v. Crowley*, 140 Cal. 141, [73 Pac. 820]; *Bradley Bros. v. Bradley*, 20 Cal. App. 1, 6, [127 Pac. 1044]; 25 Cyc. 1026.) That section provides that no action for the recovery of real property or for the recovery of the possession thereof can be maintained, unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the property in question within five years before the commencement of the action; and while it appears that neither the plaintiffs nor any grantor or ancestor of theirs was ever seised or possessed of the property, we think that under the circumstances of this case Henry Romoser may well be considered as the predecessor of the plaintiffs within the meaning of the section, since if he had carried out the terms of the understanding by virtue of which he acquired an estate in the property he would have conveyed it to the plaintiffs or their intestate, and thus have been literally their predecessor in interest. It is the estate which in equity passed to the plaintiffs upon the death of Henry Romoser which they seek by this action to recover.

There is nothing in the point that the heirs of Henry Romoser should have been joined as parties defendant to the action, for it appears that he had no heirs.

The judgment and order are reversed.

Lennon, P. J., and Richards, J., concurred.

[Crim. No. 385. Third Appellate District.—April 24, 1917.]

THE PEOPLE, Respondent, v. A. H. WILBUR, Appellant.

CRIMINAL LAW—MOTION IN ARREST OF JUDGMENT—DEMURRER.—A motion in arrest of judgment challenges the sufficiency of the indictment or information to state a public offense, and the office of such a motion is neither more nor less than that of a demurrer.

ID.—DRAWING OF CHECK—INTENT TO DEFRAUD—SUFFICIENCY OF INFORMATION.—An information charging the offense defined by section 476a of the Penal Code, sufficiently states a public offense, where it is alleged, among other things, that the defendant wrote a check payable to himself, and delivered it to a third person with intent to defraud him, notwithstanding the check was not indorsed by the defendant.

ID.—GIST OF OFFENSE—FRAUDULENT INTENT.—The gist of such an offense is in the fraudulent intent with which the check is drawn and delivered, and knowledge by the drawer and deliverer, at the time of such drawing and delivery, that he was then without assets of any kind or character in the bank upon which it was drawn to satisfy or meet it.

APPEAL from a judgment of the Superior Court of Humboldt County. George D. Murray, Judge.

The facts are stated in the opinion of the court.

Henry L. Ford, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—By an information duly filed, the district attorney of Humboldt County charged the defendant with the crime of drawing a bank check without funds in bank,

as follows: That the said defendant did, on the thirty-first day of October, 1916, at and in the county of Humboldt, "willfully, unlawfully, feloniously, fraudulently, knowingly and with intent to defraud H. A. King, make, draw, utter and deliver to H. A. King a certain check and draft upon a certain bank, banker and depositary, to wit: The First National Bank of Eureka, a banking corporation duly organized for the purpose of doing a banking business under and by virtue of the laws of the United States of America and doing business in the said County of Humboldt, that said check and draft was then and there for the payment of money and was then and there in the words and figures following, to wit:

“ ‘Eureka, Cal., October 31, 1916.

“ ‘THE FIRST NATIONAL BANK (90-147)

“ ‘of Eureka

“ ‘PAY to A. H. Wilbur	or Order	\$35.00
“ ‘Thirty five dollars	DOLLARS	
“ ‘(Signed) A. H. WILBUR.’		

that he the said defendant had not then and there sufficient funds in or credit with the said The First National Bank of Eureka a banking corporation as aforesaid to meet said check and draft in full upon its presentation as he the said defendant then and there well knew, contrary to the form, force and effect of the statute,’ etc.

The defendant, upon his arraignment upon said information on the tenth day of November, 1916, entered a plea of guilty thereto, and “waived the statutory time for the pronouncing of judgment herein,” whereupon the court postponed the pronouncing of judgment to the following day, November 11, 1916, at 9:30 A. M.

On the last-named date, the cause having been called for the pronouncing of judgment, the attorney for the accused filed and pressed a motion in arrest of judgment. The motion was based upon a number of grounds, among which were the following: 1. That the facts stated do not constitute a public offense; 2. That the information does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code; 3. That the said information contains matters which, if true, would constitute a legal justification or excuse of the offense charged. (Pen. Code, secs. 1004, 1185.)

The motion was disallowed and judgment of imprisonment thereupon pronounced.

This appeal is by the defendant from said judgment.

The point upon which the defendant relies for a reversal of the judgment is that the check, as delivered to King, having been drawn by the defendant and made payable to himself or order, and not having been indorsed on the back thereof by the latter, was worthless in the hands of King; that is to say, since the check, as drawn, did not bear upon its back the indorsement of the defendant, King could not have succeeded in passing or cashing the check or securing payment thereof. It is argued that the check, never having been legally *transferred* to King, amounted to nothing more than a piece of waste paper, that it was worthless for any purpose, and of the mere act of delivering the paper to King no charge or crime could be predicated and sustained.

We cannot agree to that contention.

A motion in arrest of judgment challenges the sufficiency of the indictment or information to state a public offense. The office of such a motion is neither more nor less than that of a demurrer. It is practically a demurrer interposed to an accusatory pleading after conviction. Necessarily, then, the question the solution of which is here submitted to us is whether the facts stated in the information constitute a public offense.

The charge laid in the information is founded on section 476a of the Penal Code, which provides: "Every person who, willfully, with intent to defraud, makes or draws, or utters, or delivers to another person, any check or draft on a bank, banker or depositary for the payment of money, knowing at the time of such making, drawing, uttering or delivery, that he has not sufficient funds in, or credit with, such bank, banker or depositary, to meet such check or draft in full upon its presentation, is punishable by imprisonment in the county jail for not more than one year or in the state prison for not more than fourteen years. The word 'credit' as used herein shall be construed to be an arrangement or understanding with the bank or depositary for the payment of such check or draft."

The elaborate discussion in the briefs, *pro* and *con*, upon the question whether there may be a legal transfer of a check by delivery under a parol or verbal agreement, or, in other

words, without a written agreement or indorsement, is of no consequence in the decision of the point made by the defendant. The element of intent which enters into the commission of the acts constituting, with such intent, the crime charged—that is, the expression, "intent to defraud," can hardly be said to mean an intent to defraud the bank, but refers (as the information here alleges) to an intent to defraud the person to whom the check is delivered, for, quite obviously, there could be but little if any chance or opportunity for defrauding the bank in such case, since, if the drawer had no assets therein or credit therewith sufficient to satisfy the draft, the bank could and would promptly repudiate and dishonor the check. And the fact that the check may be "a worthless piece of paper" in the hands of the person to whom it was delivered, because it has not been properly indorsed, does not enter as an element into the crime defined by the section upon which the information is based. The check in this case, even if indorsed by the defendant, could be no less a "worthless piece of paper," if, at the time of its presentation for payment, the drawer had no money in or credit with the bank sufficient to satisfy it. We can, therefore, conceive of no reason for saying that it is material or necessary to the statement or consummation of the offense to show or prove that the check or draft so drawn and delivered is in such form as would make it legally binding upon the bank to pay it upon presentation, if the drawer then had adequate funds in, or credit with, the bank to satisfy it.

To ascertain what are the essentials or elements constituting a crime, we must look to the statute itself defining the crime, and thus guided in this case, we find that the gist of the offense charged in the information is in the fraudulent intent with which the check or draft is drawn and delivered and knowledge by the drawer and deliverer, at the time of such drawing and delivery, that he was then without assets of any kind or character in the bank upon which it was drawn to satisfy or meet it. Hence, all that need be pleaded or proved to show or establish the fact of the commission of the offense denounced in said section is that, with intent to defraud, a party has made and drawn a check or draft upon some bank for the payment of money and delivered the same to another, knowing at the time such check was made, drawn, and delivered that he has not sufficient funds in, or credit

with, such bank to meet such check or draft in full upon its presentation.

The information in this case, as will be observed from an examination of it, follows, substantially, the language of the section under which it was drawn, and, among other things, directly charges that the defendant delivered the check to one H. A. King with intent to defraud him. Thus the offense defined by said section is clearly and concisely stated, and this is all that is required to render the information impregnable against successful attack, in whatever form the attack may or might be made, upon the ground that it does not state a public offense. And, we may add, the information is equally unobjectionable as against any other ground of demurrer or of a motion in arrest of judgment.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 2020. First Appellate District.—April 25, 1917.]

MARIE ADELE KEENEY, Respondent, v. BANK OF ITALY (a Corporation), Appellant.

TRUSTS—FOLLOWING OF FUNDS—RIGHT OF EQUITABLE OWNER.—The equitable owner of trust funds may follow them into the hands of all persons who acquire them with notice of the trust.

Id.—MINGLING OF TRUST FUNDS WITH INDIVIDUAL MONEYS—PRESUMPTION.—Where a trustee has mingled trust funds with his individual moneys, drawing upon the aggregate from time to time, it will be conclusively presumed both against him and his creditors and persons claiming under him, that the residue thereof is attributable to the trust so far as may be necessary to keep the money intact.

Id.—BANKING LAW—APPLICATION OF DEPOSIT TO DEBT DUE BANK—WHEN UNAUTHORIZED.—Where a bank has notice of the equitable rights of a third person in money derived from a check deposited to the account of one of its depositors, it is not at liberty to apply it in satisfaction of an individual indebtedness of the depositor to the bank.

Id.—DEPOSIT OF CHECK—FORM OF INDORSEMENT—FORM OF ACCOUNT—CONSTRUCTIVE NOTICE OF TRUST FUNDS.—Where a depositor carried an account with a bank under the designation "H. P. Platt, Trus-

tee," which he used generally, depositing therein his own funds and any others he might receive as agent or trustee for other persons, and such practice was known to the bank, the deposit of a check bearing the indorsement "Pay to H. P. Platt, agent, or order," was sufficient to put the bank upon inquiry as to the rights of third parties in the money represented by the check; and the form of the account also placed upon the bank the duty of inquiring as to the rights of third persons in the funds composing the account before it could appropriate them in payment of a debt due the bank from the depositor.

Id.—NATURE OF TRANSACTION—CONSTRUCTIVE NOTICE TO BANK NOT AVOIDED BY.—Assuming that the deposit of a check made payable to a depositor as agent and transferred and credited to his account constituted a sale of the check to the bank, such view of the transaction would not avoid the effect of constructive notice to the bank given by the form of the check, for its proceeds when placed to the credit of the account equitably belonged to the depositor's principals, of which the bank had the same notice as of their rights in the check itself.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Marcel E. Cerf, Judge.

The facts are stated in the opinion of the court.

Harry G. McKannay, and James A. Bacigalupi, for Appellant.

Orville C. Pratt, Jr., for Respondent.

LENNON, P. J.—Action to recover the amount of two checks aggregating \$979.98, and interest, drawn upon the defendant, a banking corporation, by a depositor therein. Plaintiff recovered judgment and defendant appeals.

The facts were agreed upon by the parties, and from their agreed statement we extract those following, which we think will sufficiently present the questions in dispute between the parties. H. P. Platt carried with the defendant an account under the designation "H. P. Platt, Trustee," which he used generally, depositing therein his own funds and any others he might receive as agent or trustee of other persons, and this practice was known to the defendant. On June 2, 1913, Platt deposited in said account a check for \$4,680, being the proceeds of a sale of real estate in which the plaintiff and her assignor were interested, and which Platt as their agent had

sold. It was a cashier's check drawn upon the First National Bank of Berkeley to the order of A. C. Wyckoff, and was transferred by him to Platt with the following indorsement: "Pay to H. P. Platt, agent, or order." Platt appended his own indorsement in corresponding terms, and the defendant duly collected the check and credited it to Platt's account. On the same day Platt drew the two checks upon which the action is based, and delivered them to the respective payees on June 5th and 6th in payment of their interests in the real property referred to, and on June 7th both were presented for payment, and payment refused upon the ground of "No funds," the defendant having some time between June 2nd and 7th appropriated, by virtue of its banker's lien, Platt's credit balance, then amounting to \$1,968.66, in satisfaction or part payment of an indebtedness due from Platt to itself.

The main question in the case is whether under the facts as narrated the trial court's conclusion is correct, that the defendant bank was charged with notice of the equitable interest of plaintiff and her assignor in the funds derived from the check of \$4,680 so deposited in said account of H. P. Platt, trustee.

There can be no doubt that a trust is created in judicial intendment whenever the legal and equitable interests in property are separated (2 Story's Equity Jurisprudence, sec. 964; *Mandeville v. Solomon*, 33 Cal. 38, at p. 44). Under this principle it will not be controverted that the proceeds of the sale of the real estate in the hands of Platt as agent equitably belonged to his principals. It is equally well settled that the equitable owner of trust funds may follow them into the hands of all persons who acquire them with notice of the trust (*Lathrop v. Bampton*, 31 Cal. 17, [89 Am. Dec. 141]; 3 Pomeroy's Equity Jurisprudence, sec. 1048); and that where a trustee has mingled trust funds with his individual moneys, drawing upon the aggregate from time to time, it will be conclusively presumed both against him and his creditors and persons claiming under him, that the residue thereof is attributable to the trust so far as may be necessary to keep the trust moneys intact (*Hallett's Case*, L. R. 13 Ch. Div. 696; *Elizalde v. Elizalde*, 137 Cal. 634, at p. 641, [66 Pac. 369, 70 Pac. 861]).

This brings us to the question of whether, both by the form of Platt's account (he being designated therein as trustee)

and the form of the indorsement of the check to him as agent, the defendant is charged with constructive notice (it is admitted that it had no actual notice) of the equitable rights of the plaintiff and her assignor in the money derived from such check. If it had such notice it was not at liberty to apply it in satisfaction of the individual indebtedness of Platt (*Miami County Bank v. State* (Ind. App.), 112 N. E. 40, at p. 43; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206, [41 N. E. 728]; *Globe Sav. Bank v. National Bank of Commerce*, 64 Neb. 413, [89 N. W. 1030]; *Nehawka Bank v. Ingersoll*, 2 Neb. (Unof.) 617, [89 N. W. 618]).

It is not contended by respondent, nor could it well be in the light of the later decisions, that if the defendant had paid out to third parties the funds here in question upon checks regularly drawn upon the account, it could be held accountable for them, for under such a state of facts no duty is cast upon the bank to inquire into the purpose for which the funds are being used (*United States Fidelity & G. Co. v. First Nat. Bank of Monrovia*, 18 Cal. App. 437, [123 Pac. 352]; *Inter-state Nat. Bank v. Claxton*, 97 Tex. 569, [104 Am. St. Rep. 885, 65 L. R. A. 820, 80 S. W. 604]; *Silisbee State Bank v. French Market G. Co.*, 103 Tex. 629, [34 L. R. A. (N. S.) 1207, 132 S. W. 465]); but the cases draw a clear distinction between such payments and an appropriation by the depositary of the fund in payment of its own claim against the trustee or agent.

As to the form of the indorsement, i. e., "Pay to H. P. Platt, agent, or order," we are of the opinion that by the weight of authority it was sufficient to put the defendant upon inquiry as to the rights of third parties in the money represented by the check. In *Third Nat. Bank v. Lange*, 51 Md. 138, 144, [34 Am. Rep. 304], a note in favor of "W., Trustee," was held to give notice of a possible trust to parties dealing with it. In *Gerard v. McCormick*, 130 N. Y. 261 [14 L. R. A. 234, 29 N. E. 115], a check signed "_____, Agent, Glass Bldgs." was held sufficient to put the payee thereof on inquiry as to the equitable ownership of the fund drawn upon. In *American Trust etc. Co. v. Boone*, 102 Ga. 202, [66 Am. St. Rep. 167, 40 L. R. A. 250, 29 S. E. 182], the proceeds of a check payable to "C. as administrator" and so indorsed by him were deposited to his individual credit with the defendant bank and used to pay his individual debt to it. It was held that the bank had notice of the trust, and was liable to the

beneficiaries thereof for the misappropriation of the trust funds through the joint act of itself and C.

In *Davis v. Henderson*, 25 Miss. 549, [59 Am. Dec. 229], the drawer and indorser of a bill of exchange had signed it "H., Agent." The court there said: "These facts appearing upon the bill itself, if not conclusive evidence that the defendant was acting in a representative capacity, were at least sufficient to put a prudent man taking the bill from the drawee upon inquiry. . . . As ordinary diligence would have placed them in possession of the terms of the contract, it is but right that they should be charged with notice of the facts as proved."

In *Bank of Hickory v. McPherson*, 102 Miss. 852, [59 South. 934], it was held that a check payable to "H., Commissioner" on its face does not belong to H. individually. The court there said: "We rest this decision upon the naked language of the check itself. . . . It appears that the check was payable to H. as commissioner, which denoted to an ordinarily prudent person that H. was acting in some sort of fiduciary capacity . . . which information if followed would have disclosed to the defendant bank the actual status of H. with reference to the money. . . . It was also perfectly manifest that on the face of the paper the money represented by the check did not belong to H." (See, also, *United States Fidelity & Guaranty Co. v. Adoue & Lobit*, 104 Tex. 379, [Ann. Cas. 1914B, 667, 37 L. R. A. (N. S.) 409, 137 S. W. 648, 138 S. W. 383]; *Cohnfeld v. Tanenbaum*, 176 N. Y. 126, [98 Am. St. Rep. 653, 68 N. E. 141]; *Bischoff v. Yorkville Bank*, 170 App. Div. 679, [156 N. Y. Supp. 563]; *Bischoff v. Yorkville Bank*, 218 N. Y. 106, [L. R. A. 1916F, 1059, 112 N. E. 759]; *United States Fidelity & Guaranty Co. v. Union Bank & T. Co.*, 228 Fed. 448, [143 C. C. A. 30].)

We think also that the form in which the account was carried, "H. P. Platt, Trustee," placed upon the defendant the duty of inquiring as to the rights of third persons in the funds composing the account before it could appropriate them in payment of a debt due to it from Platt. In *Bundy v. Monticello*, 84 Ind. 119, a bank deposit in the name of "W., Trustee," was considered, and the court held that the bank had constructive notice of the character of the funds in such deposit, saying: "The word 'trustee' means something. It was not merely *descriptio personae*, but was a description of the

fund deposited. It imported the existence of a trust, and was notice of the character of the fund."

In *Central National Bank v. Connecticut etc. Ins. Co.*, 104 U. S. 54, [26 L. Ed. 693], there was a bank account, standing in the name of "D., General Agent," and the court, while not placing its decision solely on the constructive notice to the bank afforded by those words, held that the designation of the account put the bank on inquiry as to the rights in the funds to the credit thereof of those for whom D. was agent.

In *Union Stock-yards Nat. Bank v. Gillespie*, 137 U. S. 411, [34 L. Ed. 724, 11 Sup. Ct. Rep. 118], it was held that a bank cannot take from a factor in payment of his own debt money which it either knows or should know belongs in equity to the factor's principal. To the same effect are *Sayre v. Weil*, 94 Ala. 466, [15 L. R. A. 544, 10 South. 546]; *Moore v. Hanscom*, 101 Tex. 293, [106 S. W. 876, 108 S. W. 150]; *Silisbee State Bank v. French Market G. Co.*, 103 Tex. 629, [34 L. R. A. (N. S.) 1207, 132 S. W. 465].

The fact that this account designated "H. P. Platt, Trustee," was the only one kept by Platt with the bank, and that he paid into it his own personal funds and used it as a personal account would not, we think, overcome the constructive notice which its title conveyed to the bank of the rights therein of third persons. Such notice places upon the bank the duty to inquire whether there existed any such rights; and such inquiry, if made, would probably have resulted in defendant gaining actual notice of the rights of respondent and her assignor, for there is nothing in the evidence to warrant the presumption that Platt would have concealed the true state of affairs.

Nor is this a case, as argued by the appellant, where there are two innocent parties, one or the other of whom must suffer through the wrongful act of a third. Platt did nothing wrongful when he deposited the trust funds in the way and to the credit of the account which he did; and in the next place the bank is not an innocent party if it had constructive notice of the rights of third persons in the fund.

We are of the opinion also that the addition of the word "trustee" to the name of the account is not to be regarded in the same light as the addition of that word to the name of a person in a certificate of mining stock. The cases cited by the appellant, viz., *Brewster v. Sime*, 42 Cal. 139, and *Thomp-*

son v. Toland, 48 Cal. 99, holding that the addition of the word "trustee" to the holder's name in such a certificate gives no notice of the rights of third parties therein, we believe to be inapplicable to a case like the present, for the reason that in those cases the court took judicial notice without pleading or proof that the word "trustee" on a certificate of mining stock was meaningless as a result of universal custom. We know of no reason for holding that the use of the word "trustee" in connection with the name of a bank account has become, for a similar reason, devoid of meaning.

It is strenuously urged by the appellant that the check under consideration being a negotiable instrument, its transfer to the defendant, and the crediting by the latter of its amount to Platt's account, constituted in effect a sale of the check to the defendant for a valuable consideration. Without assenting to this proposition in view of the well-known custom of the banks of San Francisco (the place of business of the defendant) of receiving customers' checks "for collection only," even this view of the transaction would not avoid the effect of the constructive notice to the bank given by the form of the check; for its proceeds when placed to the credit of Platt's account equitably belonged to his principals, of which the defendant had the same notice as of their rights in the check itself. If the defendant had paid Platt the amount of the check in money over the counter instead of placing it to his credit, and Platt had deposited the cash instead of the check, it might be difficult, perhaps impossible, to follow the fund; but, as we have seen, this is not the form that the transaction took, and we think the analogy attempted to be set up by appellant does not hold.

It is also argued very earnestly by appellant that there was no relation of trust even between the plaintiff and Platt himself, the contention being made that Platt was merely the debtor of his principals in the transaction relating to the sale of real estate made by him for their account. In support of this the language of the late Chief Justice Beatty, in dissenting from an order denying a petition for transfer in the case of *People v. California etc. Trust Co.*, 23 Cal. App. 199, 210, [137 Pac. 1111, 1115], is quoted to the effect that "When an agent is accounting to his principal and paying over the balance due his principal he is not acting in the character of agent but in that of a debtor paying his creditor." The cor-

rectness of this statement by Chief Justice Beatty is obvious, for when an agent, by reason of transactions entered into on behalf of a principal—as, for instance, receiving money for his account—becomes indebted to him, and proceeds to make a settlement, any action taken in making such settlement is taken by the agent in his own behalf. It could hardly be said that it was in behalf of the principal for if so we would have the principal through his agent paying money to himself. But this view of the matter does not help the appellant, for so long as Platt, the agent of the plaintiff, retained the proceeds of the sale it was the money of his principals and not his own.

This disposes of the points requiring detailed discussion; and for the reasons given we are of the opinion that the trial court was correct in holding that the defendant was charged with notice of the plaintiff's rights in the money applied by the defendant in reduction of Platt's individual indebtedness and in rendering judgment in her favor.

The judgment is affirmed.

Kerrigan, J., and Richards, J., concurred.

[Civ. No. 1670. Third Appellate District.—April 25, 1917.]

PANSY M. COX, Appellant, v. SAN JOAQUIN LIGHT & POWER COMPANY (a Corporation), Respondent.

NEGLIGENCE—ACTION FOR DEATH—SUBSTITUTION OF PARTY PLAINTIFF—PLEADING—CAUSE OF ACTION NOT CHANGED.—An action to recover damages for the death of a servant brought by the widow of the deceased in her own name under the mistaken supposition that the case fell within the provisions of section 877 of the Code of Civil Procedure, which provides for the maintenance of such an action by the heirs or personal representatives of the deceased, is not changed by the filing of an amended complaint after the statute of limitations had run against the cause of action, where the only change in the complaint was the substitution of the widow, as administratrix, as plaintiff, in the place and stead of herself as heir at law, so as to bring the case within the provisions of section 1970 of the Civil Code.

Id.—CONSTRUCTION OF CODE PROVISIONS—ACTIONS FOR DEATH OF DECEASED EMPLOYEES.—Section 1970 of the Civil Code, as amended in

1907, providing that in case of the negligent death of an employee, his personal representatives shall have a right of action therefor against the employer, and may recover damages in respect thereof for and on behalf of the widow, children and other dependent relatives, has not abrogated section 377 of the Code of Civil Procedure which provides that when the death of a person, not being a minor, is caused by the wrongful act of another, his heirs or personal representatives may maintain an action for damages, in so far as concerns actions by the representatives of deceased employees.

APPEAL from a judgment of the Superior Court of Kern County. Milton T. Farmer, Judge.

The facts are stated in the opinion of the court.

Borton & Theile, and Short & Sutherland, for Appellant.

Edward W. Tuttle, Kaye & Siemon, and Harriman, Ryckman & Tuttle, for Respondent.

CHIPMAN, P. J.—The following statement of the case and points relied on is taken from appellant's opening brief, as sufficiently presenting the matters now here for review:

"On the seventeenth day of June, 1911, one Fred Cox, while employed by the defendant as an electric lineman, was electrocuted and killed. By complaint filed October 13, 1911, Pansy M. Cox, widow and heir of Fred Cox, brought this action against San Joaquin Light & Power Corporation to recover damages for the death of the said Fred Cox. On the twenty-seventh day of October, 1913, plaintiff's attorneys served and filed a notice of motion to file an amended complaint which in all material respects was the same as the original complaint except that the amended complaint set forth that Pansy M. Cox was the administratrix of the estate of Fred Cox, and in the amended complaint Pansy M. Cox sued as such administratrix. Defendants opposed the motion but on the seventh day of January, 1914, the court granted permission to file the amended complaint. Thereafter defendant demurred to the amended complaint upon the ground that the cause of action set forth in the same was barred by subdivision 3 of section 340 of the Code of Civil Procedure, which demurrer was thereafter by the court overruled. The point presented by this appeal is this: In a suit against a master, for damages for death of his servant, alleged to have been caused by the negli-

gence of the master, such suit being brought by the widow of the deceased, it is a change of the cause of action to permit by amendment the administrator of the deceased to be substituted for his widow or (what we will submit is the same question) to permit the widow, as administratrix, to be substituted for the widow suing as an heir. The demurrer upon the ground that the cause of action was barred by the statute of limitations is merely a corollary of the point last above stated for, it may be admitted, that if the cause of action is not changed and the amendment is a proper one, the amendment would relate back to the time of filing the original complaint. The question is therefore as outlined above, although presented to the lower court and presented here by this appeal, under two forms of attack: First, by objection to the filing of the amended complaint; and, second, by demurrer to the amended complaint, upon the ground of statute of limitations."

That Mrs. Cox is the widow and sole heir of decedent and the only person entitled to the fruits of the judgment is not disputed.

Section 377 of the Code of Civil Procedure reads in part as follows: "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person." Section 1970 of the Civil Code, amended in 1907, abrogates in some degree the fellow-servant rule as it had previously existed, and changes somewhat the rule of assumption of risk in favor of the employee. The right of action for death reads as follows: "When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery."

It is contended by appellant that there is an "important distinction in the cause of action created by section 1970 of the Civil Code and that created by section 377 of the Code of

Civil Procedure." The distinction pointed out in defendant's brief consists, it is claimed, in the fact that under section 1970 "if the personal representative sues for a death occurring in the relation of employer and employee that such personal representative is entitled to the liberal provisions of section 1970 with regard to the fellow-servant rule and assumption of risk," whereas, if the action is brought by the representative under section 377, "the old and rigid rules relating to acts of fellow-servants and assumption of risk would apply." It is contended that the action was brought under section 377, and that by substituting the administratrix of deceased as his representative so as to bring the case under section 1970 there resulted "a complete change of the cause of action," and hence is not allowable.

Mr. Pomeroy gives us the meaning of the terms, "cause of action." Cautioning against confusing them with the "remedy" and with "the action," he says: "In accordance with the principles of pleading adopted in the new American system, the existence of a legal right in an abstract form is never alleged by the plaintiff; but, instead thereof, the facts from which that right arises are set forth, and the right itself is inferred therefrom. The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong."

The cause of action here consisted of facts equally applicable to both sections, i. e., the death of the employee through the negligence of the employer. The same facts, as shown by appellant's statement of the case, are found in both the original and amended complaints, the only difference being that in the former the widow, as heir of the employee, was plaintiff, and in the latter the widow as representative of the employee. In both complaints the same cause of action was stated. In both cases the person and only person beneficially interested was the widow. Section 377 gives the right generally to sue either in the name of the heir or representative of the deceased. Section 1970 gives the right only to the representative for the death of one sustaining the relation of employee to an employer. Whether or not section 1970 has the effect of abrogating section 377 and is exclusive, or to what

extent section 1970 may prevail over section 377 so far as they respectively authorize actions for injuries causing death, are open questions. (*Pritchard v. Whitney Estate Co.*, 164 Cal. 564, [129 Pac. 989].) But it seems now to be settled that where the relation of employer and employee exists and the employee meets his death through the negligence of the employer, section 1970 furnishes the only basis for the action. (*Ibid.*) The present action was commenced in 1911 and the case just cited was first decided in department in June, 1912, and in Bank, in January, 1913. In October, 1913, plaintiff gave notice of motion to amend. It is not surprising that plaintiff's attorney made what now appears to have been a mistake in bringing the action in the name of the widow, since the department decision of the supreme court in the case cited would seem to lend some support to plaintiff's first impression of her right to sue in her own name as heir.

In the case of *Reardon v. Balaklala Consol. Copper Co.*, 193 Fed. 189, the action was exactly similar to the action here and the same mistake was made in commencing the action. The father being the next of kin was, under section 1970 of the Civil Code, entitled to the benefit of the recovery, but erroneously, as did the widow in the present case, he commenced the action in his own name under the mistaken supposition that the case fell within section 377 of the Code of Civil Procedure; and before the error was established by a ruling on defendant's demurrer to that complaint, the time within which a new action could be commenced by the administrator had elapsed. "The sole question presented here calling for consideration," said the court, "is whether under these circumstances it was competent to allow the complaint to be amended by substituting the administrator as plaintiff in the action so commenced by the father, and thus avoid bringing a new action; or should the action be dismissed?" The proposition was pressed upon the court that the bringing of the action by the father was wholly nugatory and ineffectual to arrest the running of the statute. Speaking of this contention, Mr. Justice Van Fleet, who heard the case, said: "It involved an erroneous conception of the legal effect of the omission sought to be corrected, and a too narrow construction of the purpose and effect of the statutes, both state and federal (Code Civ. Proc., sec. 473; Rev. Stats., sec. 954, [4 Fed. Stats. Ann., p. 596; U. S. Comp. Stats. Ann., 1916, sec. 1591, p. 696]), in

providing the extent and character of relief that may be afforded by way of amendment, to avoid mistakes of the nature of that here involved. It should be borne in mind that the substantive cause of action counted on in the amended complaint has not been changed. It remains precisely the same as that stated in the original pleading. No new facts are alleged as a ground of recovery, the only change being in the name of the plaintiff and the capacity in which he sues; while the father still remains the beneficiary of the recovery sought. This being so, the change effected by the amendment is obviously in no just sense the bringing of a new action. It is one of form rather than substance, and in the interest of justice is to be treated as such, rather than to adopt a view which would result in an irretrievable bar to all remedy. Under the modern doctrine, the discretionary power of the court to such end is to be liberally exerted in favor of, rather than against, the disposition of a case upon its merits; and I am entirely satisfied after a full examination of the question induced by the reargument that, under the broad and comprehensive terms of section 954, if not as well under the statute of the state, the defect involved is one which may be cured by amendment." After reviewing some of the decisions upon the question, the learned justice said: "The principles announced in these cases are clearly applicable to the circumstances presented here. As we have seen, no change has been worked in the form or substance of the cause of action set up. That remains in all respects the same. The father is now, as he was when the original complaint was filed, the real party in interest, for whose benefit, under the express language of the statute, the action may be maintained. He has then a right to have the action prosecuted, but the law says that that must be done through the instrumentality of the legal representative rather than that of the immediate beneficiary; and this purely formal requirement is all that is accomplished by the amendment allowed. Had the father caused himself, instead of the present plaintiff, to be appointed the administrator of his dead son's estate, as was his legal right, there could be no question, under the foregoing authorities, of his right to have himself in his representative capacity substituted as plaintiff, in place of himself as an individual; and the chances are, if such had been the course pursued, the present objection would never have presented itself."

A very full discussion of the question is found in *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, [Ann. Cas. 1914B, 134, 57 L. Ed. 355, 33 Sup. Ct. Rep. 135], in which *Reardon v. Balaklala etc. Co., supra*, is cited approvingly.

In *Ruiz v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, [128 Pac. 330], the cause of action was of the same nature as the present cause of action, and the action was commenced by plaintiff as special administrator of the estate of deceased. He failed to allege that the deceased left any heir and hence, under section 377 of the Code of Civil Procedure, failed to state a cause of action, and the trial court so held on demurrer to the complaint with leave to amend. Pending time given to amend plaintiff was appointed general administrator of the estate, and upon filing an amended complaint he did so in his new capacity as general administrator of deceased's estate. Meanwhile, however, the statute of limitations had run. The court said: "It is settled by the decisions that an action of the character authorized by section 377 of the Code of Civil Procedure is one solely for the benefit of the heirs, by which they may be compensated for the primary injury suffered by them by reason of the loss of their relative, that the money recovered in such an action does not belong to the estate but to the heirs only, and that an administrator has the right to bring the action only because the statute authorizes him to do so, and that he is simply made a statutory trustee to recover damages for the benefit of the heirs. (Citing cases.) The same is manifestly made to appear in the provision of section 1970 of the Civil Code hereinbefore referred to." *Barr v. Southern California Edison Co.*, 24 Cal. App. 22, [140 Pac. 47], was a case of the character of the present case, in which the complaint failed to allege that deceased left any heirs and for that reason failed to state a cause of action. An amended pleading curing this defect, filed after the statute of limitations had run, was demurred to and demurrer sustained. On appeal the judgment was reversed and the amendment held allowable. We can perceive no good ground on which such an amendment would be justified that would not be equally available in support of the amendment here in question. Some of the authorities cited by appellant seem to support its contention. Mr. Thompson cites certain cases as supporting the rule claimed by appellant. In that connection, however, he says: "The test, under statutes allow-

ing amendments, as to whether amendments may be made to a declaration after the time limited by statute within which actions can be brought seems to be: 1. Does the original declaration state a cause of action under the statute? 2. Does the amended declaration state a different cause of action? If the first question is answered affirmatively and the second negatively, the amended declaration is not barred by the statute of limitations." (6 Thompson on Negligence, sec. 7017, p. 148.) As we think the original complaint stated a cause of action under the statute, and the amended complaint did not state a different cause of action, the test given by Mr. Thompson is fully met.

Dubbers v. Goux, 51 Cal. 153, is sometimes (as by the Utah supreme court) cited in support of the rule contended for by appellant. In that case the action was commenced by the husband, who afterward made a motion that his wife be substituted as plaintiff because she was the real party in interest. The lower court allowed the substitution and defendant appealed. The supreme court said: "The court erred in permitting Mrs. Dubbers to be substituted for her husband as plaintiff. It is not pretended that she had succeeded to any interest held by her husband pending the action, nor that she had any joint interest with him in the subject matter. On the contrary, she was substituted as plaintiff on the theory that she was the only party in interest at the commencement of the action, and had ever since been so. She was permitted to become the sole plaintiff, not to prosecute the same cause of action stated in the complaint, on the ground that she had succeeded to it, but another and distinct cause of action in her separate right. In effect, it was permitting her to prosecute a new suit, for another cause of action, by merely substituting her as sole plaintiff in the former action. It is scarcely necessary to say that section 473, Code of Civil Procedure, affords no warrant for such a proceeding." That case is easily distinguishable from the case here.

We are entirely satisfied with the view expressed by Mr. Justice Van Fleet in *Reardon v. Balaklala etc. Co.*, and do not find it necessary to consider the numerous cases cited by respective counsel.

The judgment is affirmed.

Burnett, J., and Hart, J., concurred,

58 Cal. App.—84

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 21, 1917, and the following opinion then rendered thereon:

THE COURT.—In denying the application for a hearing in this court after decision by the district court of appeal of the third appellate district, we deem it proper in view of what is said in the opinion as to the effect of section 1970 of the Civil Code on section 377 of the Code of Civil Procedure, to refer to the opinion in the case of *Gonsalves v. Petaluma & S. R. R. R. Co.*, 173 Cal. 264, [159 Pac. 724]), discussing these sections which apparently was not brought to the attention of the district court of appeal.

[Crim. No. 540. Second Appellate District.—April 26, 1917.]

THE PEOPLE, Respondent, v. REHINO LOPEZ, Appellant.

EVIDENCE—CHILD WITNESS—DETERMINATION AS TO COMPETENCY—DISCRETION—APPEAL.—In determining the competency of a child under the age of ten years to be a witness, the trial court has a discretion which seldom will be interfered with on appeal.

ID.—RAPE—EVIDENCE—COMPLAINT TO THIRD PERSON.—In a prosecution for the crime of rape committed by a father with his seventeen-year old daughter, a witness may testify that the prosecutrix complained of the act to him, but not the detail of it, regardless of the fact that she was under the age of consent.

ID.—NATURE OF CHARGE—FACILITY TO INVENT—INSTRUCTION.—In a prosecution for rape, the defendant is not prejudiced by the refusal to give an instruction warning the jury as to the danger of prosecutions for rape being used to satisfy malice or private vengeance, and declaring that in such cases the accused is almost defenseless, in view of the facility with which such charges may be invented and maintained, where the jury was fully and carefully instructed on reasonable doubt.

APPEAL from a judgment of the Superior Court of San Bernardino County. J. W. Curtis, Judge.

The facts are stated in the opinion of the court.

Albert D. Trujillo, and Ralph E. Swing, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

JAMES, J.—Defendant was convicted of the crime of rape. The crime charged was alleged in the information to have been committed with a daughter of the defendant, aged seventeen years. By the judgment of the court defendant is required to serve a term of twenty-five years' imprisonment. The appeal is from the judgment.

Counsel for appellant very correctly say that there was very little evidence, aside from that given by the prosecutrix herself, to be looked to in support of the conviction. However that may be, the only function this court is permitted to exercise is to determine whether there is any substantial evidence in support of the verdict, and whether errors appear by which the defendant was prejudiced in his right to a fair trial. It appears that in about June, 1916, defendant went to reside at Chino, in the county of San Bernardino, with his five children, three girls and two boys, the prosecutrix being the oldest of the girls. Defendant and his wife prior to that time had separated, and the former had the care and custody of the children whom, it appears, he in a general way was educating and reasonably providing for. Lizzie Lopez, the complainant, testified that the house in which they lived at Chino contained four rooms; that her father and her sister Jennie slept in one bed in one of the rooms, and that she and her young sister Ida, aged nine, occupied a couch in another room. She testified that her father commenced to pay visits to her bed shortly after the family moved to Chino, and that this continued, once or twice a month, up to September of the same year, at about which time defendant was arrested and charged with the crime of rape. Lizzie testified that she would be asleep when her father came and that she did not cry out, but attempted at different times to awaken her sister Ida by "pinching" the latter; that Ida was never awakened so as to observe the father in his unlawful act. She also testified that finally she had gone to the witness Dillon and complained to him of her father's conduct. On cross-examination she was asked as to whether she complained to anybody else, and she replied that she had told other people, among them

a young man named Cisneros; that she had written him a letter and told him about it. Referring to the times when the defendant would visit her, she said that on those occasions she would be asleep. The following questions were asked and these answers given in that connection:

"Q. And did you know what was going on? A. I knew afterward.

"Q. You didn't know at the time though? A. Yes, sir, I knew, but after it had all happened.

"Q. You didn't say anything when it was happening, did you? A. Yes, sir.

"Q. Who did you say it to? A. To him.

"Q. Well, did you say anything to your sister? A. I tried to wake her up, but I never succeeded.

"Q. Never succeeded at any of these times? A. No, sir.

"Q. Would you try each time to wake her? A. Yes, sir.

"Q. What would you do, get hold of her and shake her? A. I pinched her.

"Q. You never woke her up at any time? A. No, sir."

The theory of the defense as developed by the testimony, was that the young man Cisneros had been in the habit of calling upon the complainant during her father's absence and that the father objected to this, and both remonstrated with the daughter and administered corporal punishment because of the visits of the young man. One of the sons, a brother of complainant, testified that upon returning home he had frequently found his sister closeted with Cisneros; that at times the doors leading to the apartment where they were fastened; that he had peered through a window and observed the two lying together upon a couch in a position which, according to the descriptive terms used by the witness, was a compromising one. In substance the same testimony was given by the defendant, who denied ever having had intercourse with his daughter. The mother of Lizzie Lopez, being called as a witness, gave testimony indicating that in her opinion the girl was not of truthful mind. On the other hand, several witnesses, apparently reputable people who had resided in the same community with the defendant prior to his moving to Chino, testified that they knew appellant's general reputation for honesty and integrity, and that such reputation was bad. There was some testimony from which the jury might have inferred that children of the defendant who

gave testimony favorable to him had been coached by an aunt and instructed what to say, although this was denied both by these witnesses and the aunt referred to. The girl Ida was the young daughter who, according to complainant's testimony, at all times occupied her bed with her. This young girl was called to the witness-stand by the defendant, but the court indicated that he did not consider that she was competent to testify. We quote in full the examination of this witness and the remarks of the court:

“The Court: What is your name? A. Ida Lopez.

“Q. How old are you, Ida? A. Nine.

“Q. Do you go to school? A. Yes, sir.

“Q. What grade are you in? A. Third.

“Q. Where do you live? A. In Juvenile.

“Q. Do you know what it is to testify in court? Do you know what it is to hold up your hand? A. Yes, sir.

“Q. What do they do that for? A. To tell the truth.

“Q. If you do that, and don't tell the truth, what do they do to you? A. Put you in jail.

“Q. Anything else? Have you ever been a witness in court before? A. No, sir.

“The Court: I think this witness is too young to understand the nature of an oath that she takes, or the testimony that she gives.

“Mr. Swing (Counsel for Defendant): Very well then.”

Counsel for appellant insist that the court committed prejudicial error in refusing to allow the young girl to testify in the case. If we were permitted to judge of the competency of this witness from the printed record before us, we would perhaps find it difficult to say that she was not possessed of sufficient mentality and understanding to entitle her to testify. However, in matters of this kind the court has the duty in the exercise of sound discretion to determine that question, and it would be a rare case indeed where such determination would be interfered with upon appeal. (*People v. Craig*, 111 Cal. 460, [44 Pac. 186].) In this case we cannot say that the court, from his observation of the young girl as she appeared upon the witness-stand, and the manner in which she gave her answers, did not properly determine that the child was too young to testify understandingly and with full appreciation of the obligation of a witness' oath. It may be further observed that counsel for appellant appear to have acqui-

esced, without objection, in the court's suggestion, and made no request to be allowed to further examine the witness to test her competency.

It is next complained that the court erred in permitting the witness Dillon to relate the substance of a conversation that he had with the complaining witness prior to the arrest of the defendant. This testimony was to show the fact that the complainant did complain about the conduct of the defendant, under the rule which permits such complaints to be offered in corroboration of the charge of the prosecutrix and to show want of consent. (*People v. Wilmet*, 139 Cal. 103, [72 Pac. 838].) The question of the consent of the prosecutrix on account of her youth becomes immaterial in this case, but, it is said in the case of *People v. Wilmet, supra*, the fact of "complaint of injury on the part of one under the age of legal consent would in most cases be competent, and this court has in this respect made no distinction between cases where there was actual resistance and those where resistance and nonconsent were conclusively inferred by the law." We fail to find in the testimony given by appellant any such recitation of forbidden details as would make it appear that the admission of that testimony constituted prejudicial error. The court cautioned the witness that he could only tell what the "complaint" was, and not the detail of it, and the witness replied that she came to his office, in the middle of September, crying, and said: "I don't want to live with my father." The court then struck out this statement and instructed the jury to disregard it, and the witness was asked again as to what complaint was made and replied, "that she had had sexual intercourse with her father." Undoubtedly it was competent for the witness to tell what complainant complained about—that is, what the subject of her complaint was—and whether he phrased it as that she complained of a rape, or that she said, as he stated, that she had had sexual intercourse with the defendant is not material. The one would mean no more than the other. The defendant, on cross-examination, was not content with the statement of the complainant of the fact of the complaint made to Dillon, but asked her directly, as we have before mentioned, as to other persons she had complained to. It was proper for the district attorney to follow this examination and bring out more fully the matter of other complaints, if any were indicated to

have been made. No prejudicial misconduct can be charged to the prosecuting officer.

Complaint is made because the court refused to give certain instructions offered by the defendant. Instruction No. 9 was to advise the jury that if "the defendant [prosecutrix is evidently intended] made no outcry at the time of the alleged offense and did not immediately complain to others and that when she did complain she had some motive other than the prosecution of the defendant for the alleged offense, it is your duty to take all of these things into consideration in arriving at a verdict and unless and in spite of these facts, you are convinced to a moral certainty and beyond a reasonable doubt that the defendant did commit the alleged offense, you should return a verdict of not guilty." This instruction cannot be said to be clearly phrased, and there was no error in refusing it. The prosecuting witness was under age, and the matter of her consent or nonconsent was not material, and the defendant might well have been convicted without any evidence at all being offered as to any complaint or outcry being made by her. Instruction No. 11, offered and refused, was merely argumentative, and the defendant as a matter of right was not entitled to have it read to the jury. As to instruction No. 12, the same observation may be made; and the same may be said of instruction No. 15. Instruction No. 17, which was to advise the jury that if they believed the testimony of the prosecuting witness was inherently improbable or "possibly untrue," it was their duty to find a verdict of not guilty, in so far as it contained suggestion of pertinent instruction, was completely covered in the instruction on reasonable doubt and other instructions given by the court. Instruction No. 18, offered and refused, was an instruction warning the jury as to the danger of prosecutions for rape being used to satisfy malice or private vengeance, and proceeded to declare that in such case "the accused is almost defenseless, in view of the facility with which charges of this character may be invented and maintained." We do not consider that the refusal to give this instruction amounted to prejudicial error. It may be observed that the court very fully and carefully instructed the jury as to the necessity that it should find in fact the truth of the charge to be beyond a reasonable doubt, and that the testimony of the prosecutrix should be carefully scanned; that neither the gravity of the charge nor the fact that the

defendant was the father of the prosecuting witness was to bias the judgment of the jurors in any manner, and that he was presumed to be innocent until his guilt had been established beyond a reasonable doubt. The defendant was allowed to show very fully the alleged conduct of the prosecutrix with the young man Cisneros, in the furtherance of his contention that the prosecution arose through the ill will of the complainant because of his interference with and objections to the visits of Cisneros. As we have before stated by way of preface to this opinion, to our minds the corroborating evidence did not make out, as the record shows it, a strong case. There was no testimony by physicians or other competent persons showing that as a result of any physical examination it had been ascertained that the young girl had been tampered with. It is true that by way of rebuttal the district attorney did offer as a witness a physician and started to examine him as to some examination made of the young girl, when he was stopped by an objection that the testimony was not rebuttal, which objection was very properly sustained by the trial judge. However, the responsibility rested with the jury to determine the truth of the facts charged. It determined them in favor of the guilt of the defendant and he must endure the penalty visited upon him.

The judgment is affirmed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

[Civ. No. 1618. Third Appellate District.—April 26, 1917.]

**E. W. ROBINSON, Respondent, v. H. A. RISPIN et al.,
Appellants.**

CONTRACT FOR DRILLING OF OIL WELLS—BREACH BY LAND OWNER—DAMAGES—LOSS OF PROFITS—PLEADING.—In an action by a contractor against a land owner to recover damages for breach of a contract for the drilling of oil wells, the profits on the contract are not too speculative and remote to be a basis for damages, and are recoverable without being specially pleaded.

ID.—ASSIGNMENT OF CONTRACT—LIABILITY OF ASSIGNEE.—While the mere assignment of rights under an executory contract does not

make the assignee liable to the other contracting party, yet, where after the assignment is made, the executory provisions of the contract are fully performed, the benefit inuring solely to the assignee, and where by his actions he holds himself out as personally liable and recognizes the original contract as binding upon him, he is liable to the other party equally with the assignor.

Id.—**NOVATION—PAROL EVIDENCE.**—A novation in a written contract may be proven by parol without violating the rule as to the inadmissibility of oral evidence to vary the terms of a written instrument.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. William D. Dehy, Judge presiding.

The facts are stated in the opinion of the court.

Boutwell Dunlap, and John E. Alexander, for Appellants.

R. H. Cross, for Respondent.

BURNETT, J.—On November 10, 1910, plaintiff and defendant Rispin entered into a written agreement for the drilling of certain oil wells in Kern County. Robinson agreed to furnish the tools and labor and drill two or more wells for which Rispin agreed to pay him \$4.50 for each vertical foot drilled. Rispin was "to furnish all necessary fuel, water, tubing and casing at the well being drilled," and Robinson agreed to do the work according to certain specifications "in a thoroughly workmanlike manner under the instructions of said Rispin," and it was further provided that Robinson should not be compelled to drill to a depth exceeding one thousand feet in any one hole, and "that this contract shall cover a total of not less than 2000 feet of drilling and not less than two nor more than four wells and that there shall be no unnecessary delays by either party, either in the drilling of the wells or the furnishing of casing, fuel and water." On December 23, 1910, after Robinson had moved his crew and appliances to the land where the work was to be done, but before he had actually begun drilling, Rispin assigned all his right, title, and interest in said land (which he held under option agreements) and all his interest under said agreement with Robinson, to the defendant corporation, Lost Hills Central Oil Company. The court found that the defendant corporation accepted the assignment and the benefits and obliga-

tions arising from the agreement with Robinson, with full knowledge of all the facts relating thereto, and the work thereafter proceeded under its directions and instructions. The work was begun on December 28th and after innumerable delays, which the court found were caused by the failure of the corporation to furnish the necessary casing, fuel, and water, he succeeded, on or about the twenty-third day of February, 1911, in reaching a depth of four hundred feet, and it was mutually agreed that the well, known as "Well No. 1," should be abandoned as an oil well and should be converted into and used as a water well for further operations on the property. Plaintiff was thereupon paid one thousand eight hundred dollars for the said four hundred feet, and he moved his drilling appliances to another point on the land and he proceeded to drill well No. 2 until at the end of June, 1911, he had reached a depth of 907 feet. It was found that he could proceed no further by reason of the failure of appellants to furnish the necessary casing, and hence he ceased the drilling operations. After waiting until November 25, 1911, for defendants to furnish the casing to enable him to proceed with the work he brought suit to recover the amount due him for the work actually done, for the damages which he had sustained by reason of defendants' breach of their agreement to furnish him with the requisite fuel, water, and casing and damages for their refusal to permit him to go on and complete the drilling to the extent of the two thousand minimum feet provided in the contract. The court's judgment was in favor of plaintiff in the aggregate sum of \$6,421.25 against the defendants Rispin and Lost Hills Central Oil Company and a several judgment against Benjamin Goodwin, A. B. Smith, H. A. Rispin, and J. S. Ourish as stockholders of said corporation, for the sum of \$1,589.41 each.

At the trial appellants made common cause and they were represented by the same attorney. On the appeal another attorney appears for Rispin, and he and the other appellants assume a somewhat antagonistic attitude as to the proper theory of the case. However, they are in accord in urging several grounds for a reversal of the judgment and order denying the motion for a new trial and these will first receive attention.

Plaintiff was awarded the sum of \$1,529.25 for the loss of the profits which he would have made if permitted to com-

plete the contract. As to the various objections to the particular finding some brief suggestions may be submitted.

The court was not bound to consider the four hundred foot well as though it had been drilled to the depth of one thousand feet. There was no agreement to that effect, according to the testimony of plaintiff, and in the original contract the number of feet actually drilled was the important consideration. The parties did not even contemplate that any well should be of definite depth, but there was a limit to the number that should be developed. There was no greater reason for crediting this particular well with one thousand feet than for so considering the other one of 907 feet. In view of the testimony of plaintiff that well "No. 1" was accepted as complete to be used for supplying water, and that it was not through any fault of his that it was drilled no deeper, the court was justified in the number of feet it allowed for said work.

As to damages, the rule is, no doubt, that those of a special nature must be pleaded. General damages are said to be the natural and necessary result of the act complained of, while special are the natural but not the necessary consequence of such act. It has been held, however, that the loss of profits on a contract of this kind is the necessary consequence of a breach, and therefore it is not required to be specially pleaded. (*Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 249, [41 Pac. 1020]; *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, [96 Pac. 319].) Nor are such profits too speculative and remote to be a basis for damages. This consideration is thoroughly discussed in *Shoemaker v. Acker*, 116 Cal. 239, [48 Pac. 62], and it is sufficient to quote therefrom the following sentence: "But where the prospective profits are the natural and direct consequences of the breach of the contract they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages."

Appellants are equally at fault in the contention that plaintiff failed to show that he was prevented by the defendants from completing the work. We need not quote from the record, but we deem it sufficient to say that plaintiff testified positively that defendants failed to supply him with the casting, fuel, and water as they agreed, and therefore it was impossible for him to continue the work. Furthermore, he

testified that they abandoned the enterprise and requested him to come to San Francisco to assist them in disposing of defendants' interest in the land. Plaintiff's case did not rest upon the theory that he was prevented by the failure of defendants to pay him what was due, and therefore the doctrine of the case of *Cox v. McLaughlin*, 54 Cal. 605, has no application. It is rather an instance of the failure to furnish material which was to be used in the work, and which was made a condition precedent to the performance by plaintiff, and it is governed by the principle expounded and applied in *Alderson v. Houston*, 154 Cal. 1, 3, [96 Pac. 884].

As to the damages caused by delay it may be said, also, that support for the finding is contained in the record. It is pointed out in respondent's brief, and it is not controverted in the final brief for appellants.

There was a dispute as to the number of shares of stock in defendant corporation held by some of the other defendants. However, the finding of the court in that respect seems abundantly supported. There was no controversy as to the number of shares outstanding and that said defendants were stockholders. It was admitted by the answer that Ourish owned twenty-five thousand shares. Rispin and Goodwin admitted on the stand that each owned the same number. Smith's testimony showed also that he was liable for twenty-five thousand shares, as he admitted that this number stood in his name as trustee for his son, a minor of the age of sixteen years. (Civ. Code, sec. 322.) We can see no valid objection to the method adopted for the proof of these facts. They were matters peculiarly within the knowledge of defendants, and they were competent witnesses to testify as to the number of shares owned by each. Indeed, plaintiff endeavored to have the books of the corporation produced, that the matter might be set at rest, but he encountered serious and persistent opposition. Steps were taken for this purpose as provided by section 1000 of the Code of Civil Procedure, but we need not follow them in detail. Appellants may have acted in good faith, but they seemed strongly averse to a complete inspection by respondent of the records involved in the controversy. We think, under the circumstances, that the court was justified in holding that its order in reference to an inspection of the books had not been complied with, and in assuming the

facts to be as claimed by plaintiff. However, aside from this, the evidence was sufficient to support the finding.

We have thus noticed the foregoing contentions, although we would probably be justified in concluding that they had been abandoned by appellants, as no reference is made to any of them in the closing briefs.

We come now to the points where appellants diverge and to which the closing arguments are addressed.

The contention of the corporation defendant, the Lost Hills Central Oil Company, is that it never assumed any liability under the contract made by Robinson and Rispin. There can be no doubt, however, that the record supports the finding of the court to the effect that Rispin transferred, set over, and assigned all his right, title, and interest, under the agreement made by him with Robinson, to the defendant corporation, this transfer having been made on December 23, 1910, while the contract was wholly executory; that the defendant corporation voluntarily accepted the assignment and the benefits and obligations arising from the transaction and the agreement with Robinson, with full knowledge of all the facts relating thereto, and thereafter requested Robinson to perform the work stipulated under and pursuant to the terms of that agreement. The evidence is epitomized in the brief of respondent but it is not necessary to repeat it here.

The case seems to fall clearly within the principle of *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, [21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52]; *Anderson v. De Urioste*, 96 Cal. 404, [31 Pac. 266]; *Frese v. Moore*, 1 Cal. App. 587, [82 Pac. 542], and section 1589 of the Civil Code. Of course, as suggested by respondent, the mere assignment of the rights under an executory contract would not make the assignee liable to the other contracting party. Such was the case of *Lisenby v. Newton*, 120 Cal. 571, [65 Am. St. Rep. 203, 52 Pac. 813]. But where, after the assignment is made, the executory provisions of the contract are fully performed, the benefit inuring solely to the assignee, and where by his actions he holds himself out as personally liable and recognizes the original contract as binding upon him, he is liable to the other party equally with the assignor. Such is this case, as was *Jones v. Allert*, 161 Cal. 234, [118 Pac. 794]. Indeed, there is much evidence in the record that the corporation was the real party in interest, Rispin being a mere intermediary.

Furthermore, we may say that if the court had found that there was a novation, the substitution of the corporation for Rispin with the intention of releasing the latter from liability, the finding would be supported. There is much in the record tending to this view. It will be sufficient to refer to a portion of the testimony of Rispin. He said that he presented to the directors of Lost Hills Central Oil Company the contract between him and Robinson and that they directed him what to do under the contract; that the corporation paid Robinson what was due under the agreement; that there was an understanding that the corporation was to assume the obligations of the contract; "that it would take my place in the contract with Mr. Robinson; that the contract would be practically between Mr. Robinson and the corporation, and not with myself"; and that he notified Mr. Robinson that the corporation had assumed the contract. In fact, appellants attempted to go further and show that at the time of the execution of the said contract between Robinson and Rispin it was understood and agreed that the corporation, when formed, should be substituted for Rispin. That attempt involves what appellant Rispin claims was a prejudicially erroneous ruling of the court. The purpose of the questions addressed to the witness was stated by counsel as follows: "I wish to show by Mr. Rispin and to follow that testimony up that at and subsequent to the time when this contract was executed, on November 10, 1910, there was a distinct agreement between Mr. Rispin and Mr. Robinson, an agreement incidental to the agreement of November 10, 1910, to the effect that that agreement as signed was to be assumed by a corporation which Mr. Rispin was at that time organizing, and that the corporation would take over and assume the liability under that contract; that there was an agreement between them to that effect. And following that I wish to show that that agreement was fully and completely executed and carried out and that the liability was assumed by the corporation; that the liability of the corporation was assented to by Mr. Robinson and that Mr. Robinson looked to the corporation as the party liable and released Mr. Rispin from all obligations because of the writing which was introduced by plaintiff here as the contract. Further that all the facts and circumstances surrounding the case are proper to be shown in order that the judge may properly construe the instrument in question; and

further that the evidence of what transpired at that time would be admissible upon the ground of showing lack of consideration as far as Mr. Rispin was concerned. Those matters, I believe, are fully set forth in the allegations of the answer, sufficient to have them admitted as evidence. If there is any question in the mind of the court that these matters are not fully set forth in the answer of Mr. Rispin so that this evidence should be admitted, I then ask for leave to amend so that those matters can be fully shown." The court, however, regarded it as an effort to vary the terms of the written instrument and would not permit the questions to be answered. In this we think the court erred. The purpose was not to vary the terms of the contract but to show a collateral agreement that the contract should be assumed by another. There is no doubt a novation could be shown by proving the substitution of another party for Rispin in the contract. (Civ. Code, sec. 1531, subd. 2.) In order to prove this, there must be, of course, evidence of an agreement to that effect. Plaintiff must have consented to it in order to constitute a novation. That he so agreed at the time of the execution of the original contract would naturally be a significant circumstance in the chain of proof relied upon to establish the novation. Proof of the substitution is not required to be in writing, but may consist of parol evidence. If it was not permissible to show such an agreement at the time the written contract was executed it could not be shown at all. The same objection could be made as to a question addressed to any subsequent agreement between the parties as at the time the written contract was executed. Upon respondent's theory the novation could not be proven unless it was embodied in a written instrument. This, however, is not the law, and the contention of respondent is based upon an erroneous conception of the rule as to varying the terms of a written instrument. In *Farmers' Nat. Gold Bank v. Stover*, 60 Cal. 387, 389, defendant attempted to prove that plaintiff had agreed that a certain note and mortgage was taken by plaintiff as substitution for and in full payment of the note sued on. The evidence was admitted and thereafter excluded. The supreme court said: "This was error. The evidence which was admitted and afterward excluded tended to prove that the bank had accepted the individual note and mortgage of Stover as a substitute for the note in suit, for the purpose of extin-

guishing the obligation arising from it, or of releasing the parties to it who had become insolvent. If the note and mortgage were in fact taken as a substitute for the note in dispute, with the intent of extinguishing the obligation of it, and releasing the parties to it, the transaction constituted a defense by way of novation under sections 1530, 1531, and 1532 of the Civil Code; and the defendants were entitled to have it presented to the consideration of the jury upon the evidence adduced to sustain it." As to the sufficiency of the pleadings to present the issue, the supreme court therein approved *Kirstein v. Madden*, 38 Cal. 158, and *Stringer v. Davis*, 30 Cal. 318, wherein it was held that the trial court, if application should be made therefor, should allow such amendments to be made as will enable the court to try and determine the cause on the merits.

In *Guidery v. Green*, 35 Cal. 630, [30 Pac. 786], it was held that parol evidence offered for the purpose of showing that a subsequent written contract, which it is claimed superseded and annulled a prior written contract upon which the other is based, had been executed upon the consideration and agreement that the prior contract should be canceled and all claims of the plaintiff against the defendant thereunder waived is not incompetent as having the effect to vary or contradict the terms of either of the written instruments or to add any terms thereto. Said the court: "Such evidence is admissible as is oral testimony that the terms of a written agreement have been fully performed by the parties, or that the instrument evidencing such agreement has itself been canceled and destroyed by the concurrent act of both parties. In either case the object and effect of such evidence is not to change any of the terms of the contract, but to show that the contract has no longer any existence, and therefore cannot be made the basis of an action." So here, the purpose was to show that said agreement no longer had any existence as between the original parties, but that it had been superseded by a contract between plaintiff and the corporation. That the terms and conditions of the contract remained the same, that practically the only change was the substitution of another obligor, manifestly presents no different legal aspect from the case where an entirely different contract has been substituted.

If the rule is to be applied as claimed by respondent, then no effect could be given to that portion of section 1698 of

the Civil Code which provides that "a contract in writing may be altered . . . by an executed oral agreement." Such executed agreement could not be shown for the reason that it would be in effect to permit parol evidence to vary the terms of a written instrument. That a novation had been effected was one of the important defenses relied upon by appellant Rispin, and we think he should have been afforded the fullest opportunity to establish it.

As to the appellant corporation we may suggest that its attitude here appears quite inconsistent with its position at the trial. Therein all of the defendants, as we have stated, were represented by the same attorney, who insisted, as we have seen, that there was a complete novation, that the corporation had been substituted in the original contract for Rispin, and it complained somewhat bitterly because it was denied the privilege of making that clear to the court. It is true, also, that the motion for a new trial was joint and not several, and there is a joint appeal from the judgment. However, no point is made as to this, and we think justice requires that the judgment against Rispin for the sum of \$6,421.25 should be reversed and a new trial had upon the issue whether he was released from liability upon the contract by virtue of said alleged novation, and that the judgment and order should be affirmed in all other respects. It is so ordered.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 2228. Second Appellate District.—April 27, 1917.]

GEORGE J. SHOENHAIR, Respondent, v. S. A. T. JONES,
Appellant.

PROMISSORY NOTE—TRANSFER—WRITTEN INDORSEMENT NOT ESSENTIAL.
A formal indorsement or assignment in writing is not necessary to the transfer of a promissory note.

ID.—CONSIDERATION—SURRENDER OF PRIOR UNPAID NOTE.—The surrender of an unpaid promissory note is sufficient consideration for the making of a new note.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge.

88 Cal. App.—85

The facts are stated in the opinion of the court.

Shepard & Alm, for Appellant.

Hanson, Hackler & Heath, for Respondent.

JAMES, J.—The suit was on a promissory note executed by the defendant to the plaintiff. The appeal is from the judgment entered in favor of the plaintiff, and is presented on the judgment-roll and a brief bill of exceptions. The only point argued in the briefs is that raised by the appellant, who insists that the evidence was insufficient to support the finding of the superior court as to any consideration having been rendered to the defendant in exchange for the making of the instrument sued upon. This defendant originally made her note payable to two persons named Gardner and Cowan, who assigned the same to Clara Wherry without recourse. Clara Wherry died, and this first note appeared in the hands of plaintiff who, after negotiation with the defendant, accepted the note here sued upon in lieu of the note made at the prior time, and surrendered the former note. The point in appellant's argument arises wholly upon the construction to be given to testimony furnished by the plaintiff. The plaintiff first testified that he was "the owner and holder of the note," and as to the amount which had been paid thereon, and that the note was made in consideration of the surrender of the prior note as before mentioned. He then, identifying that prior note which was shown to him, testified as follows: "That is the note which I surrendered to the defendant in this action in consideration of the execution and delivery of the note set forth in the complaint. At the time of the execution and delivery of the note set forth in the complaint Mrs. Clara Wherry was dead. . . . The estate of Clara Wherry was never probated and no executor or administrator of her estate was ever appointed. Mrs. Wherry gave me the note for \$400 before she died, but she never indorsed or assigned the same to me. As a matter of fact the note had been in my possession during all the time that Mrs. Wherry owned the same, and I was her agent, and held it as such. When Mrs. Wherry died I sent the note for \$400 and the mortgage given to secure it to her relatives in the east; they sent it back to me." We think the court was justified in inferring from this testi-

mony that title to the note was regularly acquired by the plaintiff from Mrs. Wherry. It was not necessary that there should have been a formal indorsement or assignment executed in writing. (1 Daniel on Negotiable Instruments, sec. 28 (last paragraph); Ogden on Negotiable Instruments, p. 98; *Humboldt Mill. Co. v. Northwestern Pac. R. Co.*, 166 Cal. 175, 181, [135 Pac. 503].) Assuming, as we think was properly decided, that the plaintiff was the legal owner and holder of the first note, it will not be necessary to cite authority to such an elementary proposition that the surrender of that note, which had not been paid, furnished full consideration for the making of the obligation here sued upon.

The judgment is affirmed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 26, 1917.

[Civ. No. 2048. First Appellate District.—April 28, 1917.]

**In the Matter of the Difference and Controversy Between
J. S. THOMAS et al. and the CITY OF PETALUMA.**

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT IN CITY OF PETALUMA
—NECESSITY OF ORDINANCE.—In the doing of street work in the city of Petaluma under the provisions of the act of the legislature approved March 6, 1889, it is not necessary that the city, prior to the entering upon the work, should adopt an ordinance electing to proceed under the state law and adopting its procedure as the one to be followed in making the improvement, as section 21 of article III of the charter of the city requiring that such work should be done by ordinance not in conflict with state laws, must be read in connection with section 68 of such article, which provides that in the absence of any procedure for carrying out or effectuating any granted or implied power or authority, the general law of the state shall prevail, and be followed.

APPEAL from a judgment of the Superior Court of the County of Sonoma. Emmet Seawell, Judge.

The facts are stated in the opinion of the court.

W. F. Cowan, for Appellants.

G. P. Hall, for Respondent.

RICHARDS, J.—This is a proceeding instituted in the superior court of Sonoma County to determine the difference and controversy between the parties named therein in respect to the validity of certain proceedings for the doing of street work in and by the city of Petaluma, whereby the property of the appellants herein was sought to be charged with their proportion of the expense incident to such work. The sole question presented upon this appeal involves the legality of the procedure adopted and pursued by the said municipal corporation in doing the street work in question.

The city proceeded under the provisions of the act of the legislature approved March 6, 1889, and it is conceded by the appellants that the procedure prescribed in this state law was correctly followed out in making said improvements, except in certain respects to be hereafter noted. The main contention of the appellants is that, prior to entering upon the work of such street improvement under said state law, the city of Petaluma failed to adopt an ordinance electing to proceed under said law and adopting its procedure as the one to be followed in making said improvements. This contention on the part of the appellants is based upon the terms of section 21 of article III of the charter of the city of Petaluma, which reads as follows:

“The council shall have the power by ordinance which shall not be in conflict with any street (state) law now or the statutes of the State of California or which in the future will be placed on the statutes of this state, and such ordinance may embrace all the powers as are granted by any state law now in existence or which shall be in the future in existence.

“To establish and change the grade and lay out, open, extend, widen, change, pave, repave or otherwise improve all public streets and highways and public places, construct sewers, drains and culverts, to plant trees, construct parking, and to remove shrubs and weeds, or cause objectionable shrubs and weeds or any manner of uncleanliness or obstruction to be removed, and compel the owner of the property to pay for

such removal, to levy special assessments to defray the whole or any part of the cost of such work or improvements. Also to provide for the repair, cleaning and sprinkling of such streets and public places."

Our attention is, however, called by the respondents to section 68 of article III of the city charter, which reads as follows:

"In the absence of any procedure for carrying out or effectuating any granted or implied power or authority, the general law of this state, where applicable and where not inconsistent with any express provision of this charter, shall prevail and shall be followed."

It seems clear to us, when these two sections of the city charter of Petaluma are read together, as they must be, that no preliminary ordinance was necessary to entitle the city authorities to proceed immediately under the state law in making the street improvement under review. The city charter did not itself embrace a procedure for the doing of such work; and the only requirement of section 21 of article III of its charter is that when this character of work is to be done it should be done by ordinances not in conflict with state laws. The particular state law adopted by the city for the purposes of this work provides that the contemplated improvement shall have its inception in an ordinance of the city, for such the resolution of intention is, as required by said state law. The passage of an additional ordinance by the city resolving to adopt this ordinance required by the state law would be the doing of an idle act; and any construction of section 21 of article III of the charter which would require the doing of such act would do violence to the intentions of section 68 of article III of the same charter. We find no merit, therefore, in the appellants' contention in this regard.

As to the further point made by the appellants to the effect that there were certain specified defects in the proceedings of the city council in the course of doing the work in question, we find that these all turn upon the question as to whether the references for purposes of description contained in certain notices published during an early stage in the proceedings were to the proper city official map. The record, however, shows that whatever mistakes were made by the city officials in this respect were speedily discovered and were, we think, sufficiently rectified by republication of the notices in question

for the statutory period containing the corrected references to the proper official map. There is no merit, therefore, in the several points urged by appellants predicated upon this corrected error.

Judgment affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 2223. Second Appellate District.—April 28, 1917.]

MARY L. WHITE, Appellant, v. HOMER T. HAYWARD, Respondent.

ACTION FOR RESCISSION OF CONTRACT OF EXCHANGE—NONRELIANCE UPON ALLEGED MISREPRESENTATIONS—FINDING SUPPORTED BY EVIDENCE. In an action to rescind an executed contract of exchange of real property for secured notes, a finding that the plaintiff did not rely upon the misrepresentations claimed to have been made by the defendant concerning the property is supported by evidence that the plaintiff spent considerable time in making an independent investigation of the property, although she testified that she did rely upon the representations made.

ID.—FINDINGS—ISSUES—WHEN IMMATERIAL.—Where the matters which are found necessarily defeat the plaintiff's right of recovery it is unnecessary that the findings should dispose of any further issues, as all other issues thereby become entirely immaterial.

APPEAL from an order of the Superior Court of the County of Los Angeles denying a new trial. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

R. E. Bledsoe, for Appellant.

Ingall W. Bull, and J. E. Burnham, for Respondent.

WORKS, J., *pro tem.*—This is an appeal from an order denying a motion for a new trial. The only questions presented are as to whether certain of the findings are in accord with the evidence and as to whether certain issues are found upon at all.

The action was brought to rescind an executed contract of exchange and for damages, the subjects of the exchange being certain real property of the appellant, situated in California, and certain notes held by the respondent and which were secured by mortgages on real property near Fort Morgan, Colorado. Judgment went for the respondent. The negotiations leading up to the trade were held at Pomona, California, and the rescission was asked because of certain misrepresentations claimed to have been made by respondent concerning the Colorado property, in his endeavor to bring about the exchange. The nature of these representations it is not necessary to mention, as the trial court found with appellant that they were not true. It was further found, however, that "plaintiff did not rely on each, all or any of the representations made by the defendant," and it is to the question of the propriety of this finding that we must first give attention, as it is one of the findings assailed by appellant.

The appellant herself, speaking of her first interview with respondent on the subject of the proposed trade, testified as follows: "He gave me the address of a bank at Fort Morgan, and some real estate agents' names, but I do not remember the names. The bank, I think, was the First National. This was about the last of December, 1910, or the first of January, 1911, and I told Mr. Hayward I would investigate and if I found the land and mortgages as represented we would come to some agreement and we agreed to meet at Mr. Burnham's office. . . . A short time after that, a week or two later, in answer to a telephone message, I went to Mr. Burnham's office, in Pomona, . . . and met Mr. Hayward again. In the meantime I had spoken to Mr. Kennedy, an officer in the bank at Pomona, where I do business, the First National, and had him write to the Fort Morgan bank as to the value of these securities. I do not remember whether I got any report from him about it before I agreed to the trade or not, but I never saw any letter he received. I remember getting some information sometime that had come to Mr. Kennedy, but I don't remember just what it was, because before I had obtained it, either the trade was made or I had decided to make it. . . . When I went to Mr. Burnham's office, Mr. Hayward was there, or else he soon came in. I told him I had decided to make the trade, and we signed up an agreement." On her cross-examination the appellant testified further: "At

the time of our first meeting and just before he left Mr. Hayward told me to investigate the values of the mortgages and the lands described in them and gave me the name of the First National Bank of Fort Morgan, Colorado, to write to, to ascertain the character of the lands and the values of the mortgages and some weeks later it was agreed that fifteen days more to investigate the character of the lands and the values of the mortgages should be given me."

The agreement signed at Mr. Burnham's office set forth the terms of the trade and contained this provision: "Mary L. White to have 15 days to investigate values of property covered by said mortgages." One of appellant's witnesses, who was present at her first interview with respondent, testified that Mrs. White "said that if she found the property was as he represented that she would make the trade."

The testimony produced on the part of the respondent amplifies what is above quoted from appellant's case, and but a small part of it need be mentioned, considering the extent to which appellant's own case gives support to the finding in question. Respondent says that his first interview with Mrs. White occurred in the early part of December. He then says, *inter alia*, "She asked for references, and on the back of another of my business cards I gave her the name of the First National Bank of Fort Morgan, the Morgan County National Bank, the Home Savings Bank, Mr. Dunn and Mr. Layton, who were real estate men, and Mr. Farnsworth, who was the county treasurer." He further says that their next meeting was about ten days later, and that appellant then said to him: "I have considered this proposition and it looks reasonably favorable to me." The parties met again, according to respondent, in the first week in January, at Mr. Burnham's office, the conference evidently being the same one which appellant says was held at that place. Mr. Hayward states what there occurred: "She said 'I am ready to trade with you.' I said to her, 'Mrs. White, have you made a thorough investigation of the Colorado property?' and she said, 'I have not received an answer to the last inquiry yet.' Then I said, 'I will put my property in escrow, leaving you the privilege of withdrawing this at any day or moment that you see fit without even the thought of calling me up; if you find that the Colorado property is not as you expect, you may withdraw from this without any preliminaries at all. We will draw up

the contract and I will put my stuff in escrow that will bind me and not you.' " It was then that the contract was drawn allowing appellant fifteen days for further investigation as to the value of the Colorado property.

The record also shows that Mr. Kennedy, who is mentioned in the testimony of appellant, wrote to the First National Bank at Fort Morgan concerning the Colorado property, and the letter is reproduced in the transcript. Mr. Kennedy testified: "We got an answer, and showed it to her. I think we gave her the letter. We asked as to the value of the lands, and the answer seemed satisfactory as to values and to Mrs. White."

We have been at some pains to quote from the record, as the finding upon this particular question controls the case; but we need not go further, although there is other evidence in support of the finding. It is plain that Mrs. White desired to make an independent investigation in the premises, that, after a considerable time spent in negotiation and apparent investigation, she contracted for a further delay for the purpose of making additional inquiry, and that she expended that time in such inquiry. Under such circumstances, a finding that she did not rely upon the representations of respondent was amply justified, even though her testimony, as shown in the record, contains the statement that she did rely on them.

There are five other findings of the trial court to which appellant takes exception, but what is found in them upon the issues which they purport to cover is of no moment, as such issues were upon matters subordinate to and which are controlled by the very proper finding that the appellant did not rely upon the representations made by respondent. "Where the matters which are found necessarily defeat the plaintiff's right of recovery, it is unnecessary that the findings should dispose of any further issues, as all other issues thereby become entirely immaterial." (*Smith v. Dubost*, 148 Cal. 622, [84 Pac. 38].)

The order is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1839. Second Appellate District.—April 28, 1917.]

N. E. CONKLIN, Respondent, v. S. A. WOODY, Appellant.

COUNTIES—EMPLOYMENT OF SPECIAL COUNSEL—DELEGATION OF AUTHORITY BY SUPERVISORS—LACK OF AUTHORITY.—Under section 4041, subdivision 16, of the Political Code, which authorizes boards of supervisors to direct and control the prosecution and defense of all suits to which the county is a party and by a two-thirds vote of all the members, to employ counsel to assist the district attorney in conducting the same, the board has no authority to delegate to the district attorney or to any other person the right to employ special counsel, as the board alone is authorized to make the employment.

ID.—EMPLOYMENT OF COUNSEL IN CRIMINAL CASES—INCREASE OF COMPENSATION OF DISTRICT ATTORNEY.—Under section 4041, subdivision 16, of the Political Code, it is beyond the power of a board of supervisors to subject the county to any expense for the employment of counsel to act in criminal cases, and moreover, by so doing, the compensation of the district attorney would be increased, which is forbidden by the constitution.

APPEAL from a judgment of the Superior Court of Kern County. Howard A. Pairs, Judge.

The facts are stated in the opinion of the court.

Matthew S. Platz, for Appellant.

N. E. Conklin, *in pro. per.*, for Respondent.

JAMES, J.—Appeal from a judgment directing the issuance of a mandate against the defendant requiring him, as auditor of the county of Kern, to draw a warrant in favor of the petitioner in payment for services and certain expenses incurred as described in the demand of petitioner filed and approved by the board of supervisors of said Kern County.

On the second day of March, 1915, the board of supervisors of Kern County, by more than a two-thirds' vote, adopted the following resolution:

“It appearing to the satisfaction of the board that the communication delivered to this board on the 10th day of February, 1915, from the District Attorney, discloses the situation supported by facts that make it necessary, in order to have the cases now pending in our Superior Court and which

were pending at the time the present District Attorney entered upon his duties, promptly and diligently prosecuted, as the law requires, in connection with the handling of the current business of the County; that it will be necessary for the District Attorney to incur expense in the employment of special prosecutors or counsel, and it further appearing from said communication and from facts within the knowledge of this board that action should be instituted for the recovery of penalty upon bonds given to the county on bail for present fugitives from justice and under liquor licenses revoked, and the board being of the opinion that it would be in the interest of the county to have this work done forthwith, and such expense incurred therefor; Be it Therefore Resolved that the necessity for incurring of said expense exists, and that the District Attorney be and he is hereby authorized to incur for the purpose of employing not exceeding three special prosecuting attorneys or counsel for a term or terms not to exceed three months, not to exceed \$125.00 per month for each of such prosecutors or counsel, such services to be rendered in the prosecution of criminal cases and prosecuting of suits upon said bonds."

Pursuant to the authority alleged to have been conferred by this resolution, the district attorney employed petitioner and he later filed his demand with the board of supervisors. The demand was itemized as required by law, the first item of which was for rental of an automobile in traveling from Bakersfield to Taft "in investigation and searching for evidence in criminal case of *People v. Aden*, \$10.00." The second was of a like kind for automobile use to certain points in Kern County and itemized as being "in case of *People v. Reigan*, expense of District Attorney's office, \$15.00." The last item was stated as follows: "To services as special prosecutor and counsel in prosecution of criminal cases and in prosecution of suits upon bonds, being bail bonds and liquor bonds, said claim being for services rendered for and during March, 1915, per resolution of the Board of Supervisors, \$125.00." By this appeal two questions are made as against the judgment: (1) That the board of supervisors was without power to delegate to the district attorney the right to employ special counsel for any purpose in either civil or criminal cases; (2) That the board of supervisors was without power to make any employment of special counsel, except

for the purposes of suits to which the county was a party. Among the enumerated powers of boards of supervisors as contained in section 4041, subdivision 16 of the Political Code, such boards are authorized "to direct and control the prosecution and defense of all suits to which the county is a party and by a two-thirds vote of all the members, may employ counsel to assist the district attorney in conducting the same." A provision in like terms has been inserted in the various county government acts in force for many years. By this provision a board of supervisors is authorized to contract with outside counsel and employ such counsel for the purpose of assisting the district attorney in conducting "suits to which the county is a party." The authority is not given to the board to authorize some other person to make the employment. We apprehend that it would be essential, where such employment is made, that the board of supervisors pass a resolution declaring its determination so to do, and specifying the name of the person employed and the terms of the employment. The resolution first recited herein does not purport to make an employment of any person for any of the purposes specified. Therefore, we think that the claim as presented by petitioner was not one which the board was authorized to allow.

For the purpose of considering the second point made, we may assume (our conclusion being to the contrary, however), that the employment of petitioner by the district attorney was regular, and that the board of supervisors could in the manner attempted delegate its authority. There is the further limit placed upon the power of the board to be exercised in that direction, to wit, that it may only employ counsel to assist the district attorney in "suits to which the county is a party." (*County of Modoc v. Spencer*, 103 Cal. 498, [37 Pac. 483].) From the resolution as adopted by the board, it appears that the employment intended to be authorized was a general one, and that it was intended to give the district attorney the right to have assistance at the cost of the county for the prosecution of criminal cases, as well as in suits to recover the penalty upon various bonds. It was beyond the power of the board of supervisors to subject the county to any expense for the employment of counsel to act in criminal cases. Moreover, by so doing, the compensation of the district attorney would be increased, which is forbidden by the

constitution. The itemized claim filed by petitioner shows that the services for which he claimed compensation of \$125 were services rendered in both criminal cases, and in the prosecution of suits upon bail and "liquor" bonds. It may have been that the expense incurred for auto hire could have been properly allowed as contingent expense of the district attorney authorized to be paid by section 4307 of the Political Code, but the board of supervisors was not advised by the statements contained in the demand of petitioner as to how much of the \$125 claimed was for services in criminal cases for the allowance of which no authority of law existed.

The judgment is reversed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

[Civ. No. 1638. Third Appellate District.—April 30, 1917.]

J. A. MANOR, Respondent, v. J. D. DUNFIELD, Appellant.

CONDITIONAL SALE—PLEDGE—RIGHTS OF PLEDGEE.—Where the pledgee of an automobile purchased under a conditional contract of sale assumes the obligations of the purchaser under the contract and his assumption is recognized by the seller, he is entitled to all the rights and is subject to all the liabilities of the contract, and a wrongful taking of the possession of the machine by the purchaser, and assignment of his interest in the contract to a person who had sufficient notice to put him upon inquiry as to the wrongful taking, is illegal, as against the pledgee.

APPEAL from a judgment of the Superior Court of Colusa County. Ernest Weyand, Judge.

The facts are stated in the opinion of the court.

Millington & Millington, for Appellant.

U. W. Brown, and Harmon Albery, for Respondent.

BURNETT, J.—One F. E. Partain entered into a contract with one C. L. Sanders for the purchase of a Ford automobile. Afterward by agreement a Rambler machine was substituted

for the Ford. There is no doubt that the said Sanders was the owner of the Ford, and there is sufficient circumstantial evidence that he was also the owner of the Rambler, although the direct evidence is to the effect that the latter belonged to the Sanders Brothers. This is of no importance, however, as it is indisputable that both G. L. Sanders and the Sanders Brothers agreed to the substitution of one machine for the other. The Ford machine was delivered to Partain, but, on account of his failure to meet the payments called for by the contract of sale, G. L. Sanders again took possession of it. Partain and plaintiff then entered into an agreement whereby the latter was to pay Sanders what was due, and the machine was to be turned over to plaintiff and used by him on his auto-stage line. It was further agreed that the machine was to be restored to Partain whenever he repaid plaintiff the amount of money so advanced to Sanders. Plaintiff then made arrangements with G. L. Sanders to pay him the amount due, the sum of \$108.40, Sanders understanding that the machine was to be turned over to plaintiff. There was some question as to the form of the receipt offered by Sanders, so he was informed that the money was in the bank and he could get it when he gave a proper receipt. Before the payment was made plaintiff was injured and was thereafter in a sanatorium for some time. While there he had his brother pay Sanders \$133.40, the amount due at that time on the machine. This payment was made on September 11th. On September 15th Partain, who was working for plaintiff, driving his automobiles on his stage line, traded said Ford machine for the Rambler. Plaintiff knew nothing of this until the 1st of October, when Partain brought it to plaintiff's house and turned it over to him. From the time of the trade or substitution of one machine for the other, the Rambler was used on plaintiff's auto-stage line, driven by plaintiff's drivers, and had on it his stage sign and license number. Furthermore, it was stored in a garage in Colusa in the name of and by plaintiff, and bills against the same were charged to him and he had possession of the machine until November 13, 1916. On November 1st Partain quit working for plaintiff, and the Rambler remained in possession of the latter. On November 11th plaintiff met G. L. Sanders and said to him that he had the money for the November payment on the machine, but that he had some money coming in the following

week and he could make the whole payment on Wednesday, to which Sanders consented, telling plaintiff that the Rambler was his and for him to take it, the car standing near at that time. However, before the following Wednesday, namely, on November 13th, Partain went to the garage, took possession of the machine, drove it away, and thereafter assigned all his interest under the contract with Sanders to Dunfield, and directed the bill of sale to be made to him. The bill of sale was so executed by Sanders Brothers and G. L. Sanders, but, before its execution, one Jake Whalen, manager of plaintiff's stage line, in the presence of defendant, his attorney, and Partain, demanded possession of the machine, showing the attorney an order for its possession he had from G. L. Sanders. Defendant heard the order read over the phone to Sanders. Whalen stated the reason he obtained the order was on account of the fact that Partain had run off with the car to Arbuckle. Said order was dated November 5th, and prior to the said agreement between plaintiff and G. L. Sanders as to the final payment, and defendant knew that Whalen was in the employ of plaintiff. Partain did not repay to plaintiff any portion of the money the latter had paid to Sanders, nor did he offer to do so. On November 15th plaintiff demanded of defendant the possession of the machine, but it was refused and the suit followed. The foregoing statement embodies a fair inference from the evidence, and the facts thus appearing justified the findings of the court that plaintiff was in the possession and entitled to the possession of the machine at the time it was delivered to defendant, that it was illegally taken from him, and that defendant had knowledge or the means of acquiring knowledge of plaintiff's claim to the possession of it.

No extended consideration of the situation seems necessary. The facts are not complicated and the legal principles involved are rudimentary and familiar. As between plaintiff and Partain there was a pledge of the machine which was to continue until plaintiff was repaid the amount of money that he advanced to Sanders. In that respect the case falls within the provisions of section 2986 of the Civil Code. There was the necessary agreement between the parties, an actual delivery of the property and a visible, unequivocal, and continued change of possession. By nothing said or done had plaintiff forfeited or yielded his right to said possession,

Plaintiff's possession was such as to satisfy the requirement even of absolute ownership, and to protect against the claims of creditors as contemplated by section 3440 of the Civil Code. That Partain had some degree of control over the machine is of no moment, since it was entirely by virtue of his employment, and under the direction of plaintiff, that he was authorized to use the machine. Any other use or assumption of control by him was a violation of his agreement with plaintiff. As a legal proposition, therefore, it is altogether clear that Partain had no right to deprive plaintiff of the possession of the machine, and his attempted transfer of his interest to defendant had no effect whatever upon plaintiff's claim. As to the relation of plaintiff and G. L. Sanders, there was a complete novation. Plaintiff assumed the obligation of Partain under the contract of sale and his substitution was recognized by Sanders. The agreement between plaintiff and Partain was ratified by Sanders, who accepted plaintiff as the debtor instead of Partain. Hence plaintiff was entitled to the rights and subject to the liabilities of the conditional sale. He was not in default, and there had been no declared forfeiture at the time he was deprived of the possession of the machine. It follows that even the owner could not take the property away from him, for it will not be disputed that the vendee is entitled to the possession until he loses the right by virtue of his violation of some provision of the contract. Indeed, as far as G. L. Sanders is concerned, it could probably be held that by reason of his express agreement with plaintiff he could not question the latter's ownership of the property. Sanders Brothers, for reasons already stated, are equally bound with the father.

The only theory upon which defendant could hold the property would, manifestly, be that he was an innocent purchaser for value without notice. We think it not unreasonable to conclude, however, that he had knowledge of the contract with plaintiff, and that the arrangement with him was for the purpose of defeating plaintiff's claim. At any rate, there was sufficient evidence that defendant was put upon inquiry, and he ought to have found out, if he did not, that the machine was wrongfully taken from the possession of plaintiff.

It may be suggested that, under the view taken by the court, complete justice may be done to all the parties. It was found not that plaintiff was the owner of the machine,

but entitled to the possession of it by reason of the pledge. To become the owner he must make the final payment. It is presumed he will do this, and thus may appellant be reimbursed for his payment. It is no violent presumption to assume that the machine is not as valuable as it was, but if plaintiff does not complete his contract he is liable, of course, to the penalty of forfeiture. Even Partain, no doubt, will be accorded ample opportunity to redeem the machine so that he may become the proud owner, not of the somewhat lowly Ford, but of the more pretentious Rambler.

We have not quoted from the decisions cited, but if interesting suggestions concerning the legal questions more or less involved herein are desired, we may refer to *Stevens v. Irwin*, 15 Cal. 503, [76 Am. Dec. 500], *Goldstein v. Hort*, 30 Cal. 372, *George v. Pierce*, 123 Cal. 172, [55 Pac. 775, 56 Pac. 53], and *Stevinson v. Joy*, 164 Cal. 279, [128 Pac. 751].

The judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 31, 1917.

[Civ. No. 2035. First Appellate District.—May 2, 1917.]

N. P. MILLOGLAV, Respondent, *v.* LYDIA ZACHARIAS,
Appellant.

TRUST—PURCHASE OF REAL PROPERTY—PAYMENT OF CONSIDERATION BY ANOTHER—AGREEMENT NOT TO SELL OR ENCUMBER—VALIDITY NOT AFFECTED.—The trust which is presumed to result under section 853 of the Civil Code where a transfer of real property is made to one person, and the consideration therefor is paid by or for another, is of necessity one by which the grantee would be bound not to sell or encumber the property to the injury of the person for whose benefit the trust was presumed to arise; and the mere fact that the parties had understood or agreed that such would be the effect and terms of the trust relation would not in any way militate against the creation or validity of the trust.

ID.—TRANSFER OF REAL PROPERTY—AGREEMENT TO SUPPORT—BREACH—

RESULTING TRUST.—Where a confidential relationship exists between two persons and one of them purchases real property and causes it to be conveyed to the other upon the agreement that the latter would care for, support, and maintain the former for the balance of his natural life, and thereafter the latter refuses to carry out the agreement, a resulting trust arises in favor of the former.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Donahue, Judge.

The facts are stated in the opinion of the court.

Stoney, Rouleau, Stoney & Armstrong, for Appellant.

Rose & Silverstein, for Respondent.

RICHARDS, J.—This is an appeal from a judgment in favor of plaintiff in an action to have declared a trust in his favor arising out of the facts set forth in his complaint. The appeal is taken upon the judgment-roll without a bill of exceptions, and hence the appellant's contentions are limited to two; first, that the judgment is not supported by the pleadings; and second, that it is not justified by the findings of fact and conclusions of law in the case.

The complaint is in two counts, in the first of which it is alleged in substance that the plaintiff, who is the father of the defendant, furnished the purchase price of the lands upon which a trust is sought to be impressed, and that the title was taken in the name of the defendant in trust for and for the benefit of the plaintiff and with the understanding that she was not to encumber or sell the property; that in violation of said understanding the defendant has already encumbered said property by a deed of trust to secure her promissory note in the sum of two thousand dollars borrowed money, which she has wrongfully appropriated to her own use; and it is further averred that she threatens to convey and dispose of the property to some person or persons unknown to the plaintiff for the purpose of cheating and defrauding the plaintiff out of his right, title, and interest in the said property.

It is contended by the appellant that the first count of the plaintiff's complaint does not state a cause of action for the

reason, as she urges, that the trust alleged therein to have been created is an express trust; and since the condition of the trust agreement was that the grantee of the title would not sell or encumber the property, this condition, being hostile to the grant, is void. In support of this contention the appellant strongly relies upon the cases of *Prey v. Stanley*, 110 Cal. 423, [42 Pac. 908], and *Ripperdan v. Weldy*, 149 Cal. 667, [87 Pac. 276].

We cannot give our support to the appellant's contention, nor to the application to this cause of the foregoing cases upon which she relies. The averments of the first count of plaintiff's complaint as above summarized bring this case clearly within the terms of section 853 of the Civil Code, which provides that "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." The trust which would be presumed to so result would of necessity be one by which the grantee would be bound not to sell or encumber the property to the injury of the person for whose benefit the trust was presumed to arise; and the mere fact that the parties had understood or agreed that such should be the effect and terms of the trust relation would not in any way militate against the creation or validity of the trust which came into being under the terms of the foregoing section of the Civil Code. The cases above referred to and relied upon by the appellant have no application to such a state of facts as is presented by the first count of the complaint in this case. They refer to cases where a fee-simple title has by the act and intent of the parties passed to the grantee, and where an attempt was made in restraint of alienation to impose a condition repugnant to the interest created by the conveyance of the property. But no such situation is presented by the case at bar according to the averments of the first count of plaintiff's complaint. We think, therefore, that the appellant's objection to the sufficiency of the first count of the complaint herein is not well taken.

The appellant makes a similar objection to the second count of the complaint. The averments of this count are in substance that prior to the twenty-second day of September, 1913,

the plaintiff was approached by the defendant with the proposition that if he would purchase the property in question herein and cause the same to be conveyed to the defendant she would care for, support, and maintain him in her home to be established thereon for the balance of his natural life, and would not sell or encumber or otherwise dispose of said property or any portion thereof; and that relying upon these promises of the defendant the plaintiff did supply the sum of four thousand five hundred dollars as the purchase price of said property and caused the same to be conveyed to said defendant; but that notwithstanding her promise and agreement, she refuses to prepare his meals or otherwise care for him as she had agreed to do, and has encumbered the property for a debt of her own in the sum of two thousand dollars, and has further threatened to convey or dispose of the same for the purpose of defrauding the plaintiff out of his right, title, and interest therein.

At the time of the trial of the action the court permitted both counts of the plaintiff's complaint to be amended so as to conform with the proofs by the insertion in each of an averment to the effect that the plaintiff had great confidence and trust in the defendant arising out of the relation between them, and relying upon said confidence, and fully believing that the defendant would hold said property in trust for plaintiff as agreed, the plaintiff had directed said conveyance to be made to the defendant.

We are able to perceive no material difference in these two counts of the plaintiff's complaint in so far as they each aver facts from which a resulting trust would arise in favor of plaintiff. It is true that the second count in the complaint amplifies somewhat the terms and requirements of such trust by the addition of the provisions calling for the care and maintenance of the plaintiff in the home of the defendant upon the purchased property. These added conditions are quite common in trusts of this character and are not hostile to them; and we are of the opinion that the averments of this second count in plaintiff's complaint taken in connection with the later amendment thereto, averring the existence of a confidential relation between the parties, upon which the plaintiff relied, in investing the defendant with the apparent title to the property in question, bring this case within the range of those authorities in this state which deal

with the subject of trusts arising out of actual or constructive fraud on the part of those persons who are invested with apparent but not real ownership of the property. (*Brison v. Brison*, 75 Cal. 525, [7 Am. St. Rep. 189, 17 Pac. 689]; 90 Cal. 323, [27 Pac. 186]; *Alaniz v. Casenave*, 91 Cal. 41, [27 Pac. 521]; *Odell v. Moss*, 130 Cal. 352, [62 Pac. 555]; *Jones v. Jones*, 140 Cal. 587, [74 Pac. 143]; *Lauricella v. Lauricella*, 161 Cal. 61, [118 Pac. 430].) Under these authorities we are satisfied that the complaint herein in both its counts, and especially as amended at the trial, states a cause of action.

The final contention of the appellant is that the findings do not support the judgment. The findings reveal a somewhat different state of facts from those averred in the complaint, and they are also somewhat prolix and detailed in an apparent effort on the part of the trial court to make them responsive to the averments and denials of the defendant's cross-complaint and to the averments of the answer thereto. Without rehearsing these matters in detail, it may be said that the main divergence of the findings of the trial court from the averments of plaintiff's complaint springs from a finding to the effect that the defendant had contributed the sum of \$850, which she had placed in the hands of the plaintiff to be used in the establishment of the home of the parties, and which may have been used in buying the furniture therefor, since the court expressly finds that the purchase price of the real estate did not consist of moneys belonging to the defendant. The court undertook to equalize these matters in its judgment by providing therein that the defendant should pay over to the plaintiff the sum received by the encumbrance of the property less whatever credit she would be entitled to by reason of her contribution to the equipment of the home. We think this sort of adjustment of the monetary affairs of the parties was fully within the discretion of a court of equity. While the court does not make an express finding upon the subject of fraud on the part of the defendant, it does find the facts from which the implication of fraud would necessarily arise; and we are otherwise of the opinion that the findings of the court, taken as a whole, are responsive to the issues in the case, and that they support the conclusions of law and the judgment based thereon.

It follows that the judgment should be affirmed, and it is so ordered.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 28, 1917.

[Civ. No. 1559. Third Appellate District.—May 2, 1917.]

THEODORE J. STEPHENS et al., Copartners, etc., Respondents, v. WEYL-ZUCKERMAN & CO. (a Corporation), Appellant.

CONTRACT FOR CONSTRUCTION OF LAUNCH—DEFAULT IN COMPLETION—DIRECTION TO PROCEED WITH WORK—COMPENSATION FOR DAMAGES—LACK OF WAIVER.—The right to rescind a contract for the construction of a launch calling for its completion within a stated time is waived by the act of the party ordering the launch in urging the contractor to rush the completion after knowledge that it would not be completed within the contract time, but the right to insist upon compensation for the damage caused by the delay is not waived.

Id.—ACCEPTANCE OF SUBJECT MATTER OF CONTRACT—NONWAIVER OF DAMAGES FOR INCOMPLETE PERFORMANCE.—The party not in default under a contract is often constrained by his necessities to take what he can get under his contract when he can get it. Such conduct does not and should not operate as a waiver of the right of action for damages.

APPEAL from a judgment of the Superior Court of San Joaquin County. C. W. Norton, Judge.

The facts are stated in the opinion of the court.

David L. Levy, and Campbell, Weaver, Shelton & Levy, for Appellant.

Daniel V. Marceau, for Respondents.

BURNETT, J.—The action is for the balance due for the construction by plaintiffs of a gasoline launch under an ex-

press contract requiring the payment by defendant of the sum of \$1,550 and providing that the launch should be completed on June 1, 1914. The boat was not ready on time but was accepted by defendant, which claimed, however, that it was entitled to a rebate or recoupment in consequence of the damage caused by the delay. It was, though, found by the court that there was a waiver of any such claim and the real controversy revolves around this consideration. The basis for the court's conclusion is found in these facts: "Defendant, with knowledge of the fact that said launch would not be completed in the time specified by said contract, did not insist upon any penalty from plaintiffs but urged them to rush said launch to completion. That plaintiffs did rush said launch to completion. During the period prior to August 8, 1914, in which payments were made as hereinafter set forth, defendant did not at any time threaten plaintiffs for any penalty for their failure to deliver the boat on time, but rather urged plaintiffs to complete the boat as soon as possible; that plaintiffs did complete the boat as soon as possible; that prior to August 8, 1914, defendant raised no objection as to the failure of plaintiffs to complete the same on June 1, 1914."

We think, however, that the learned trial judge failed to distinguish between the right to rescind or abandon the contract and the right to insist upon compensation for the damage caused by the delay. The former was undoubtedly waived, but the other legal privilege was unaffected by the acts detailed in said finding. The distinction between the two methods of redress as to waiver is quite clearly shown by the authorities.

In *Crocker-Wheeler Co. v. Varick Realty Co.*, 43 Misc. Rep. 645, [88 N. Y. Supp. 412], the subject of litigation was a contract to furnish and install two elevators. The trial judge held that the conduct of defendant "in urging plaintiff to continue and hurry completion of the work, and finally accepting the same when performed and paying therefor a large part of the stipulated price thereof," was a waiver of damages for the failure to complete the work within the prescribed time. It was determined, however, by the appellate division that the defendant waived simply any right it might have asserted to plead the delay as a defense to an action for the agreed price, the court saying as to the other question:

"It did not, however, thereby waive its right to counterclaim for any actual damage it might have suffered by reason of the delay. . . . The error into which the court below fell was in treating defendant's acquiescence in the completion of the contract as a waiver of damages for nonfulfillment, instead of only a waiver of any defense to a claim for the contract price."

In *Howard v. Thompson Lumber Co.*, 106 Ky. 566, [50 S. W. 1092], appellant agreed to build a tramway and haul logs for appellee. Compensation was to be paid as the work progressed, but a certain percentage thereof was to be retained and appellants' rights thereto forfeited if they did not perform as agreed. In an action by appellants, the defense of tardy performance was pleaded and appellee responded by alleging a waiver. In the course of the opinion it was stated that after the failure to furnish the logs within the time agreed upon, appellee "continued to receive and pay for the logs delivered and urged defendants to go on with their contract." The court, after quoting from Lawson on Contracts, declared: "Appellee, in accepting the logs actually delivered, and paying therefor, and in urging and encouraging appellants to go ahead with the work, waived its right to claim the forfeiture of the ten per cent on monthly settlements and the seventy-five cents per thousand feet for failure to complete the tramway, and appellants are entitled to maintain this action to recover the amount due them under the contract for logs actually delivered; but appellee is entitled to recoup by way of setoff or counterclaim damages sustained on account of the failure of appellants to keep their contract, unless such failure was occasioned by the fault of appellee."

The supreme court of this state declared the same principle in *Bryson v. McCone*, 121 Cal. 153, [53 Pac. 637], as follows: "But consent on the part of plaintiff that defendant might continue the work after the stipulated time was not a waiver of damages or of the breach. Upon the breach plaintiff, not being himself in default, had the right to rescind or permit the defendant to complete the work and sue for damages occasioned by the default."

It was similarly held by the supreme court of Michigan in *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, [113 N. W. 591], wherein the defendant urgently insisted upon the de-

livery of the goods contracted for after the stipulated time had expired; by the supreme court of the United States in *Phillips etc. Const. Co. v. Seymour*, 91 U. S. 646, [23 L. Ed. 341], wherein it was stated that upon a contract for the sale of personal property to be delivered upon a certain day it might be received afterward and the vendor could recover for it, but that the vendee might recoup by setting up a cross-demand for damages for the delay; by the supreme court of Michigan in *Pittsburgh & O. Min. Co. v. Scully*, 145 Mich. 229, [108 N. W. 503], wherein it was held that defendant, by receiving and paying for coal that was not *promptly* shipped, did not waive the claim for damages because the coal was not *promptly* delivered. Many other cases to the same effect are cited by appellant, and they seem to recognize the rule as of general acceptance.

The justice of this view is affirmed in Page on Contracts, volume 3, page 2320, upon the ground that "the party not in default is often constrained by his necessities to take what he can get under his contract when he can get it. Such conduct does not and should not operate as a waiver of the right of action for damages."

We can perceive no just ground for holding that any of the facts recited by the court, or all combined, should operate as a waiver of the right to claim whatever damages accrued to appellant by reason of the failure on the part of respondents to keep their engagement. Assuredly, the failure to demand a penalty, or to use threatening or acrimonious language, is no evidence of a relinquishment of this right. The effort to induce respondents to complete the work as speedily as possible and the payment of the several installments as they were due were entirely consistent with the purpose of claiming whatever might be due defendant under the contract. It was the duty of appellant to make the payments as called for, and its urgency as to the completion was evidence of good faith and a desire to save respondents as well as appellant from unnecessary loss.

Some cases are cited by respondents which, it is claimed, support the view of the lower court, but upon examination they appear disappointing and inadequate for the purpose.

In *Eyster v. Parrott*, 83 Ill. 517, it seems the only waiver related to "the right to demand a forfeiture of the work already done," and the court allowed the defendant the dam-

ages which he had suffered by reason of the delay in completing the building.

The question of the right to recover damages for delay did not arise in *Paddock v. Stout*, 121 Ill. 571, [13 N. E. 182], *Tidwell v. Southern Engine etc. Works*, 87 Ark. 52, [112 S. W. 152, 154], or *Stiewel v. Lally*, 89 Ark. 195, [115 S. W. 1134].

The right to recover damages for delay was recognized in *Davis v. Fish*, 1 G. Greene (Iowa), 406, [48 Am. Dec. 387], but it was held that certain considerations were too remote and speculative to be regarded in determining the loss. Therein it was stated: "But the rule is settled beyond question that if a job of work is of some use and value to the employer, or vendee, though improperly done, or is not within the stipulated time, still the workman or vendor is entitled to recover as much as the work is reasonably worth, making such reasonable allowance as the circumstances may require. . . . In connection with this point it may be appropriately observed, that in case of a breach of such specific contract if the injured party can protect himself from damage, he is bound to do so if practicable, at a moderate expense or by ordinary efforts; and he can charge the delinquent party for such expense and efforts only, and for the damages which could not be prevented by the exercise of such diligence."

The decision in *Medart Pulley Co. v. Dubuque etc. Mill Co.*, 121 Iowa, 244, [96 N. W. 770], turned upon an agreed settlement of the claim for damages evidenced by a complete payment, but it was held that partial payment and acceptance alone did not constitute a waiver of the claim.

Baldwin v. Foss, 71 Iowa, 389, [32 N. W. 389], decided that "if a note that has been obtained by fraud is voluntarily paid by the maker with full knowledge of all the facts he cannot recover the amount so paid." The soundness of that decision could hardly be questioned.

In *Reid v. Field*, 83 Va. 26, [1 S. E. 395], it was held that defendant by executing his note for the full amount due had waived his claim for an equitable setoff for damages caused by the delay in delivering the merchandise.

The gist of the decision in *Sirch Electrical & T. Laboratories v. Garbutt*, 13 Cal. App. 435, [110 Pac. 140], was to the effect that having accepted the work, knowing it was defective, and having paid for it, the defendant could not

recover the money paid. The point involved herein was not considered in that case.

A question similar to the one before us arose, however, in the subsequent case of *Machinery & Electrical Co. v. Young Men's Christian Assn.*, 22 Cal. App. 416, [134 Pac. 724], and the same court declared: "It is well settled that an owner may receive and use a structure built for him by a contractor without necessarily waiving his right to offset damages occasioned by defects or imperfect completion against the contract price."

It will be noticed that none of the cases cited by respondents is directly in point. As to those holding that full payment constitutes a waiver of damages for delay, it may be said, also, that the weight of authority seems to be the other way. We content ourselves as to this with a citation of the cases appearing in appellant's brief: *Johnson v. North Baltimore B. Glass Co.*, 74 Kan. 762, [11 Ann. Cas. 505, 7 L. R. A. (N. S.) 1114, 88 Pac. 52]; *Industrial Works v. Mitchell*, 114 Mich. 29, [72 N. W. 25]; *Clydebang etc. Co. v. Castenada* [1905], App. Cas. 6 (decided by the house of lords); *North Alaska Salmon Co. v. Hobbs, Wall & Co.*, 159 Cal. 380, [35 L. R. A. (N. S.) 501, 113 Pac. 870, 120 Pac. 27]; *Gilmore v. Williams*, 162 Mass. 351, [38 N. E. 976].

There is, indeed, a sentence in the opinion of this court in *Mannix v. Wilson*, 18 Cal. App. 595, 601, [123 Pac. 981], that seems encouraging to respondents, but if read with the context it will not be so understood.

As to whether time was of the essence of the contract there would seem to be little doubt in view of the positive agreement that the boat was to be completed "two weeks after arrival of engine but in no event later than June 1, 1914." But, as pointed out by appellant, this does not affect the question involved herein, but only the consideration whether one party can regard the contract as broken or forfeited by the failure of the other to perform on the specific day. Even if time is not of the essence, the aggrieved party is entitled to just compensation for the delay. (Civ. Code, sec. 1492.)

We do not mean to hold that it may not be shown that appellant waived its claim for any damage in consequence of the delay, but we are satisfied that the facts found by the court below are not sufficient to justify such conclusion.

In the event of another trial, if respondents claim a waiver they should set it up with due formality by permission of the court, that the issue may be unquestionably presented for determination.

The judgment is reversed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1851. Second Appellate District.—May 8, 1917.]

GEORGE HAY, Appellant, v. R. McDONALD, Respondent.

CONTRACT—“I. O. U.” OF BANK CASHIER—EVIDENCE—OBLIGATION OF BANK—PAROL PROOF INADMISSIBLE.—An agreement for the payment of a commission on a sale of real property in the form of an “I. O. U.” signed “R. McD., Cashier,” does not, when examined alone and for what it shows upon its face, evidence the contract of the bank of which the signer was cashier; and, in an action brought to enforce payment of the agreement, it is error to admit parol evidence to show that the contract was that of the bank and not that of the cashier.

ID.—CONTRACTS—PARTIES AND SIGNATURES—PAROL EVIDENCE.—Where, in the body of an instrument, no words appear which serve to define the agreement as being made on behalf of a party other than he whose signature is attached thereto, it will not be deemed to be the contract of another party, even though there may appear after the appended signature of the individual, qualifying or descriptive words, such as “president,” “secretary,” or “cashier.” In such cases parol proof is admissible to identify the party against whom the obligation is legally chargeable.

ID.—ADMISSIBILITY OF PAROL EVIDENCE—EXTENSION OF LIABILITY TO PRINCIPAL.—The rule that where an agent contracts in terms not fully expressing his representative capacity, parol evidence is admissible to show that it was understood by the parties that another person was intended to be bound, or that there was a principal wholly undisclosed or unknown to the opposite party, does not operate to allow an agent who contracts apparently in his own name to relieve himself of liability, but is a rule which extends to the other party the option of also proving a charge under the contract against the real principal.

APPEAL from a judgment of the Superior Court of Kern County, and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

C. L. Clafin, E. W. Owen, and J. W. Wiley, for Appellant.

Geo. E. Whitaker, and E. L. Foster, for Respondent.

JAMES, J.—Appeal from a judgment in favor of defendant and from an order of the trial court denying a motion for new trial. The action was brought to enforce payment of one thousand dollars on an alleged written promise of the defendant. The writing evidencing the alleged agreement was in the following form:

“Bakersfield, Mar. 29-07.

“I. O. U.

“One Thousand dollars on completion of sale of lots 3 & 4 in Block 273 in City of Bakersfield.

“R. McDONALD,

“Cashier.”

It appears that plaintiff as an agent was attempting to effect a sale of certain real property which was owned by one Weill. Plaintiff had failed to make satisfactory terms with Weill as to the commission to be paid to him for his services, and learning that the Kern Valley Bank had authority in some contingency to sell the lots of land for the price of fifteen thousand dollars, proposed to the bank through McDonald, the cashier, that the sale be made through the bank for sixteen thousand dollars and that plaintiff be protected as to a commission in the amount of one thousand dollars. As evidence of this agreement for the payment of commission, the “I. O. U.” above set out was made by McDonald. It will be noted that the Kern Valley Bank was not a party to this action. The court made findings, which are supported by the evidence, to the effect that plaintiff at all times knew that in the making of the contract by McDonald the latter was acting for the Kern Valley Bank of which he was managing agent and cashier. Further findings were made, however, to the effect that when Weill, the owner of the property, learned that the sale was to be made to a buyer represented by Hay, he threatened to refuse to complete the transaction, but offered to allow the bank to pay to the plaintiff the sum of four hundred dollars, which it is found the plaintiff agreed to accept, and that thereupon the property was sold and the purchase price paid; that thereafter

the Kern Valley Bank tendered to plaintiff the sum of four hundred dollars which the plaintiff refused to accept. The conclusions of law are brief and are as follows: "That the I. O. U. described was the contract of the Kern Valley Bank, and not that of the defendant; that the plaintiff knew and accepted said I. O. U. as the act and deed of the Kern Valley Bank; that the defendant is entitled to judgment."

The chief point raised here by the appellant is that the court erred in allowing oral evidence to be introduced to show that the contract was the contract of the Kern Valley Bank and not of the defendant. This finding of the court, which followed the proof so made, is claimed to be erroneous: "That the plaintiff did not at any of the times mentioned treat or negotiate with the defendant in his individual capacity; that the said plaintiff had all of said negotiations and transactions with the said Kern Valley Bank, and it was so understood and agreed by him." As we gather from the conclusions expressed by the trial judge, the judgment as entered depended for support upon that particular finding of fact which appellant attacks and which is quoted above. This case was here on a former appeal. (See *Hay v. McDonald*, 21 Cal. App. 204, [131 Pac. 74].) The trial judge there had granted a motion for nonsuit, after the plaintiff had introduced his evidence. The motion was granted upon the same ground as that which is made the basis for the judgment here, to wit, that the contract was not the contract of McDonald, but of the Kern Valley Bank. This court there said: "The written contract or memorandum in the form of an 'I. O. U.' cannot be said to evidence a contract of the Kern Valley Bank when it is examined alone and for what it shows upon its face. Where, in the body of an instrument, no words appear which serve to define the agreement as being made on behalf of a party other than he whose signature is attached thereto, it will not be deemed to be the contract of another party, even though there may appear after the appended signature of the individual, qualifying or descriptive words, such as 'president,' 'secretary,' or, as here, 'cashier.' In such cases parol proof is admissible to identify the party against whom the obligation is legally chargeable. (*Hobson v. Hassett*, 76 Cal. 203, [9 Am. St. Rep. 193, 18 Pac. 320]; *Southern Pac. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, [50 Pac. 650]; *McCormick v. Stockton etc. R. R. Co.*, 130 Cal. 100, [62 Pac. 267].)" It is a rule which

has been many times illustrated by the decisions that where an agent contracts in terms not fully expressing his representative capacity, parol evidence is admissible to show that it was understood by the parties that another person was intended to be bound, or that there was a principal wholly undisclosed or unknown to the opposite contracting party. In such cases such principal may be held. This rule, however, does not operate to allow an agent who contracts apparently in his own name to relieve himself of liability, but is a rule which extends to the other party the option of proving a charge under the contract against the real principal also. We find no difference in the decisions or statements of the text-writers on this subject. "Where an agent has entered into a contract which in terms charges himself, parol evidence is not admissible to discharge him by showing that he intended to charge the principal, but where the contract bears upon its face evidence that the person signing was in fact an agent, and where the contract is so framed as to render it uncertain whether the agent or the principal was intended to be bound, parol evidence may be received to show that it was the intention to bind the principal and not the agent. But although parol evidence may not in other cases be admissible to release the agent, it may be made use of to charge the principal. . . . And this doctrine applies as well to those contracts which are required to be in writing as to those to whose validity a writing is not essential." (1 Mecham on Agency, 2d ed., sec. 1176.) In *Hobson v. Hassett*, 76 Cal. 203, [9 Am. St. Rep. 193, 18 Pac. 320], the contracting party signed "A. Hassett, President." The court there, in discussing the subject pertinent to this case, said: "Professor Parsons says: 'If an agent make a note in his own name, and add to his signature the word "agent," but there is nothing on the note to indicate who is principal, the agent will be personally liable, just as if the word "agent" were not added.' " In *Southern Pacific Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, [50 Pac. 650], the court declared: "Thus the rule is well settled that where a reading of a simple contract, however inartificially it may be drawn, discloses that it is executed for or on behalf of a principal, or discloses an intent to bind such principal, or even leaves the matter one of doubt, parol evidence may be employed to determine whose contract it is, and this even in cases where the instrument is sufficiently clear in its terms to bind the

agent. This is not contradicting by parol the terms of a written instrument, for, as has been said, 'It is no contradiction of a contract, which is silent as to the fact, to prove that a party is acting therein not on his own behalf, but for another.' 'This does not deny,' said Parke, B., 'that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal.' (Bishop on Contracts, sec. 1084.)" As will be noted from the authorities to which we have called attention, while parol evidence in such a case as this is competent, it is not competent for the purpose of exonerating the signer from personal liability, but is competent for the purpose of extending the liability to other parties for whom the signer may have intended to contract and for whom he had authority to contract. Such is the rule which we deduce from a reading of the cases. We have noted that the court made a finding of an alleged compromise agreement by which it was asserted that the plaintiff agreed to accept the sum of four hundred dollars in lieu of the amount set out in the written instrument sued upon. The sufficiency of these facts found to establish a modification of the original agreement or a substituted or new agreement, is not argued in the briefs, and a consideration of those questions is not necessary to the decision in the case. However, it may be proper to suggest that under the facts found and alleged by the defendant, it would seem that such subsequent agreement was lacking in the essential of a sufficient consideration to make it of binding effect. The judgment of the court was plainly based upon the finding that defendant assumed no liability by the contract, but that the liability was rather that of the Kern Valley Bank. In this conclusion we think the court erred for the reasons stated.

The judgment and order are reversed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 3, 1917.

[Civ. No. 2234. Second Appellate District.—May 4, 1917.]

ANDREW J. ELLIOTT, Respondent, v. EARL E. ROBBINS, Appellant.

PUBLIC LANDS—RECOVERY OF POSSESSION—ADVERSE DECISION OF LAND DEPARTMENT—ATTACK FOR EXTRINSIC FRAUD.—Where in an action to recover the possession of public land based upon a certificate of entry issued by the register and receiver of the land office, the defendant in addition to alleging adverse possession at the date of the inception of the claim upon which the plaintiff's certificate of entry was founded, alleged a contest between them and a determination therein adverse to the defendant, he cannot attack the decision of the Land Department upon the ground that the plaintiff testified falsely in such contest.

ID.—ADVERSE POSSESSION—PRIMARY EVIDENCE OF OWNERSHIP OVERCOME.—While a certificate of purchase and of location of public lands is primary evidence that the holder or assignee of such certificate is the owner of the land described therein, this evidence may be overcome by proof that at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims.

ID.—DECISIONS OF LAND DEPARTMENT—EFFECT OF.—The decisions of the officers of the Land Department on questions of fact upon evidence tending to prove the same, are conclusive upon third persons, at least in the absence of fraud or imposition practiced upon them. And if fraud is practiced upon them, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties affected by their decisions.

ID.—ATTACK UPON LAND DECISION FOR FRAUD—RULES GOVERNING.—Where a decision made by the officers of the Land Department in a contest of conflicting claims concerning land entries is attacked upon the ground of alleged fraud in obtaining the same, the right to make such attack is governed by the same principles which control in testing the validity of the ordinary judgments of courts.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

Noel & Sorensen, for Appellant.

Conkling & Brown, for Respondent.

CONREY, P. J.—This is an action to recover possession of public land the legal title to which is vested in the United States of America. The defendant appeals from the judgment, which was entered pursuant to an order granting the plaintiff's motion for judgment on the pleadings.

The plaintiff relies upon a certificate of entry issued by the register and receiver of the United States land office at Los Angeles, California, upon the application of plaintiff to make desert land entry for the land described in the complaint. The answer admitted the issuance of the certificate of entry, but alleged adverse possession by the defendant of the land at date of the inception of the claim upon which plaintiff's certificate of entry was founded, and at all times since under claim of right by the defendant to make homestead entry for said land, and alleged compliance by defendant with all of the requirements of the homestead laws of the United States. Counsel for respondent admit that if this had been the entire answer, the defense might have been sufficient. While a certificate of purchase and of location of public lands is primary evidence that the holder or assignee of such certificate is the owner of the land described therein, this evidence may be overcome by proof that "at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims." (Code Civ. Proc., sec. 1925; *Haven v. Haws*, 63 Cal. 452.) It follows that when the defendant stated in his answer that he was in adverse possession of the land at the times stated, such answer constituted a defense to the plaintiff's alleged cause of action.

But the answer alleged further facts as follows: That at a time prior to the commencement of this action, the defendant had offered and attempted to make a homestead application upon said land; that the plaintiff also filed an application to enter said land pursuant to an alleged claim of preferenced right of entry thereon as successful contestant in certain contests against the desert land entries of certain other persons, and that in making his application, plaintiff alleged that the land described in his said application was formerly embraced within said successfully contested entries; that at a hearing had before the register and receiver of the United States district land office at Los Angeles to determine the respective

rights of entry of the plaintiff herein and this defendant, "the plaintiff herein testified falsely as to the location of the land described in the said contested entry, and that said false testimony was so given by said plaintiff herein with intent to deceive the register and receiver of said land office, and that as a result of the fraud and deceit so practiced upon them, the said officials of said land office, relying upon said false testimony so given with intent to deceive them, held and decided that the land described in plaintiff's complaint herein was formerly embraced in said contested entry, and that the said plaintiff herein as successful contestant was entitled to exercise a preferred right of entry for said land; that the land described in the complaint herein was not embraced in said contested desert land entry, nor in either of them, and but for the false testimony given by the plaintiff herein at the hearing above mentioned the officials of the United States land office would not have held that said land, or any part thereof, was embraced within either of said contested entries and would not have held that the plaintiff herein was entitled to exercise any preferred right of entry, or any right of entry, for said land."

It is a well-established proposition that the decisions of the officers of the Land Department on questions of fact upon evidence tending to prove the same, are conclusive upon third persons, at least in the absence of fraud or imposition practiced upon them. And if fraud is practiced upon them, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties affected by their decisions. (*Sanders v. Dutcher*, 168 Cal. 353, 357, [143 Pac. 599]; *Shepley v. Cowan*, 91 U. S. 330, 340, [23 L. Ed. 424, 428]; *Marquez v. Frisbie*, 101 U. S. 473, 476, [25 L. Ed. 800].) But where a decision made by the officers of the Land Department in a contest of conflicting claims concerning land entries is attacked upon the ground of alleged fraud in obtaining the same, the right to make such attack is governed by the same principles which control in testing the validity of the ordinary judgments of courts. Those principles are thoroughly settled. "Even granting that the decree in *Marceau v. Fiske* was based upon Mrs. Marceau's false testimony, it may not be set aside in this action for that reason. There was no extrinsic fraud by which the unsuccessful litigants in that case were prevented from having a fair submission of the controversy.

True the plaintiff swore falsely, but where a trial of issues in any case is had, the parties must be prepared to meet and to expose perjury then and there. . . . Therefore, we must hold that we may not upon the ground of such fraud nullify the effect of that judgment." (*Fresno Estate Co. v. Fiske*, 172 Cal. 583, 593, [157 Pac. 1127, 1131], and decisions there cited; *United States v. Throckmorton*, 98 U. S. 61, [25 L. Ed. 93]; *Nicholson v. Leatham*, 28 Cal. App. 597, 603, [153 Pac. 965, 155 Pac. 98].

In the present case it appears by the allegations of the defendant's answer that in a contest between the plaintiff and the defendant before a competent tribunal, the claim of respondent Elliott of right to enter upon this land was sustained, and that the certificate of entry upon which the plaintiff relies was issued pursuant to that judgment. The defendant alleges that the decision was obtained by fraud and deceit, but the fraud and deceit described by his answer are exclusively of a kind which, under the decisions above mentioned, do not authorize the court to set aside or disregard the land office decision. For the purposes of the motion for judgment on the pleadings, the plaintiff is deemed to have admitted the truth of all the allegations of the defendant's answer, and of course they are admitted and affirmed by the defendant. The case thus exhibited to the court was sufficient to establish the plaintiff's right to recover possession of said land.

The judgment is affirmed.

James, J., and Works, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 2, 1917.

[Civ. No. 1855. Second Appellate District.—May 7, 1917.]

W. L. MYERS, Respondent, v. DAVID HERSKOWITZ,
Appellant.

LANDLORD AND TENANT—VIOLATION OF CLAUSE OF SUBLEASE—ACCEPTANCE OF RENT—RIGHT OF ACTION NOT WAIVED.—Under the terms of a sublease of a portion of a storeroom, the acceptance by the sublessor of earned rent after knowledge of the violation by the sublessee of a clause in the sublease prohibiting the placing of goods in the aisle space reserved for the common use of tenants, is not a waiver of his right to prosecute an action in unlawful detainer, where it is shown that the plaintiff made continuous objection to the violation of the clause, and the defendant continued in its violation, and also continued in the possession of the premises during the pendency of the action.

ID.—WAIVER OF FORFEITURE—CONTINUING COVENANT—FORFEITURE—ESTOPPEL.—In the application of the rule that where a particular act or omission entitles a landlord to declare a forfeiture, the receipt of rent accruing subsequent to the act waives the forfeiture if the lessor had knowledge of the facts, there is a distinct difference between a covenant or condition which is of a continuing nature and one not of that nature. Where the general course of dealing between parties had led one of them to believe that a strict compliance with the terms of a condition binding on him will not be required, the other party may be estopped from claiming the forfeiture.

ID.—CLAUSE OF LEASE—COVENANT OR CONDITION—IMMATERIALITY.—In an action in unlawful detainer to recover the possession of a portion of a storeroom for violation of a clause in the sublease thereof prohibiting the placing of goods in the aisle space reserved for the common use of tenants, it is immaterial whether such clause constituted a covenant or condition, as the provisions of section 1161 of the Code of Civil Procedure apply equally to conditions or covenants.

ID.—DAMAGES—EVIDENCE—RENTAL VALUE OF PREMISES—QUALIFIED WITNESS.—A witness is sufficiently qualified to testify as to the rental value of premises as a basis for the award of damages, who is shown to have been familiar with rental values in the neighborhood for the past three or four years.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.
Fred H. Taft, Judge.

The facts are stated in the opinion of the court.

John C. Stick, for Appellant.

Edward M. Selby, for Respondent.

CONREY, P. J.—Appeal by the defendant from the judgment and from an order denying his motion for a new trial.

The plaintiff was the owner of a lease covering a storeroom building in the city of Los Angeles. One of the storerooms of that building was known as No. 554 South Main Street. The storeroom was sublet in separate sections to several tenants. The defendant was the owner of one of these subleases for a described portion of said storeroom for a period ending December 31, 1914. There was extending through the storeroom an aisle space reserved for common use of the tenants. Defendant's lease provided that "that certain space so reserved shall be used for the common purpose of ingress and egress of any and all persons doing business in said room and their patrons, and to be used exclusively for said purpose; it being especially and expressly agreed that no goods, wares, or merchandise shall be placed, kept, or permitted in said space so set aside for the common use aforesaid, but that the same shall at all times be kept free and clear for the uses hereinbefore specified." In September, 1913, the plaintiff and defendant entered into an agreement whereby defendant's lease (subject to the conditions set out therein, with exceptions not important here) was extended for a further period of two years. It was agreed that if any default be made in any of the covenants or conditions of the lease, the defendant would by such default forfeit all right, title, or interest thereunder.

This is an action in unlawful detainer. It is alleged in the complaint, which was filed on June 15, 1914, that at all times since the fourth day of September, 1913, the defendant failed, neglected, and refused to permit said space so reserved to be used exclusively for the purposes limited by the lease and has repeatedly placed and kept goods, wares, and merchandise in said space so set aside for common use, and has refused to keep said space free and clear for the uses specified in the lease. It was alleged that by reason of defendant's breach of said conditions and covenants the plaintiff was unable to rent or sublet other portions of said storeroom, whereby plaintiff was damaged in the sum of \$750. On June 4, 1914, the plaintiff served upon defendant a notice in writing which referred

definitely to the covenants above stated and the claimed breach thereof by the above-mentioned acts of the defendant, and required the defendant to perform said conditions and covenants or deliver possession of said premises to the plaintiff within three days after the service of said notice. It is alleged that defendant neglected to comply with this notice. The notice given was the notice required by section 1161, subdivision 3, of the Code of Civil Procedure. The defendant by his answer herein admitted the contract as pleaded, but denied that he had refused, neglected, or failed to perform the said conditions of the lease; and denied that because of such neglect or failure the plaintiff was unable to rent or sublet the premises, and denied that the plaintiff had suffered damages by reason of any act or neglect on the part of defendant. The defendant further alleged, as a separate defense, that the plaintiff and the plaintiff's assignor had waived all right which they may have had, under the lease, to the space alleged in the complaint to have been occupied by the defendant.

The principal contention requiring attention here arises from appellant's claim that respondent waived the alleged infraction of the lease by accepting payments of rent at times when respondent knew the facts constituting such infraction. The rent was regularly paid and accepted monthly in advance until and including May, 1914. On June 1, 1914, appellant tendered the amount of rent for that month by sending to respondent a check therefor, and the check was returned to appellant. Appellant then deposited the same to the credit of respondent in a bank at Los Angeles, and respondent was notified thereof. In July respondent drew that money from the bank. The same procedure was followed by the respective parties each month thereafter down to the time of the trial, which occurred in March, 1915. Where a particular act or omission entitles the landlord to declare a forfeiture of the lease, the general rule is that the receipt of rent accruing subsequent to the act which works the forfeiture, waives the forfeiture, if the lessor at the time of receiving such rent has knowledge of the facts entitling him to such forfeiture. The rent which he accepted must be rent which became due after the breach committed by the tenant. (*McGlynn v. Moore*, 25 Cal. 384, 394; *Silva v. Campbell*, 84 Cal. 420, [24 Pac. 316].) But in the application of this rule there is a distinct difference between a covenant or condition which is of a continuing

nature and one not of that nature. While the unconditional acceptance by the landlord of moneys as rent, which rent has accrued after the time a tenant should have surrendered possession, will constitute strong evidence of the landlord's waiver of his notice to quit, nevertheless the question of waiver is one of intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. To establish such waiver the evidence must indicate a meeting of minds and the intentional forbearance to enforce a right. (*Alden v. Mayfield*, 164 Cal. 6, at p. 11, [27 Pac. 45].) Where the general course of dealing between parties has led one of them to believe that a strict compliance with the terms of a condition binding him will not be required, the other party may be estopped from claiming the forfeiture. What we have to determine, therefore, is whether the plaintiff manifested an intention to waive his objections to the conduct of the defendant, and whether in so doing he misled the defendant to his injury by causing defendant to believe these infractions of the covenant would be condoned.

The court found that it was not true that the plaintiff or his assignor had waived their rights as to this matter. Appellant insists that the evidence is insufficient to support that finding; but we think that the evidence does support the finding. The defendant admitted that he received from the plaintiff two letters prior to the time of the notice served on June 4th. One of these stated that the defendant occupied too much space around a certain post at the side of the aisle. The second letter, dated March 17, 1914, called defendant's attention to the aisle space in question here. During the month of May, 1914, additional violations of the same covenant of the lease took place. Thereafter the plaintiff proceeded as above stated, and diligently prosecuted this action. Under these circumstances, we think that the conduct of the plaintiff in accepting the money, not in advance, but after the completion of the several months, was not a waiver of his right to prosecute the action. The covenant was of a continuing nature, the defendant was continuing to violate it, and the plaintiff was continuing to object to such violation and continuing his attempt to obtain possession of the premises. The tenant having succeeded in retaining possession of the premises during the pendency of the action, plaintiff was entitled to compensation therefor, and after the benefit had been re-

ceived by the defendant the plaintiff might reasonably accept such compensation, to which he was entitled, without being held to have waived the right of action which he was then prosecuting. In *Ramish v. Workman*, *ante*, p. 19, [164 Pac. 27], it was held that the landlord was entitled to recover rent for a period which included the time between the entry of a judgment for possession and the date of actual ejectment of the tenant. "So long as defendants continued to occupy the premises pending the final determination of the action for unlawful detainer, the lease constituted the measure of their liability for such time as they remained in possession." Under these circumstances, we perceive no reason why plaintiff's acceptance of compensation to which he was clearly entitled should force upon him an implied waiver which he did not intend and which evidently the defendant knew that he did not intend. "Neither will the receipt of rent after a landlord has actually commenced his action of ejectment for the forfeiture, or as compensation for the occupation, the landlord reserving the right to re-enter, amount to a waiver." (Taylor on *Landlord and Tenant*, 9th ed., sec. 497.)

Appellant contends that the clauses of the lease involved in this controversy constitute a covenant and not a condition, and that under the rules applicable thereto a forfeiture for a breach thereof should not be permitted. Since the agreement between these parties affirmed the right of forfeiture through breach of the "covenants or conditions of the lease," it would seem that the stipulations here in question created qualifications whereby the estate granted might be defeated and did amount to a condition. (*Knight v. Black*, 19 Cal. App. 518, 522, [126 Pac. 512].) But the distinction is not material, since the provisions of section 1161 of the Code of Civil Procedure, under which this action is maintained, apply equally to "conditions or covenants."

Appellant urges also that the evidence is insufficient to support the findings which determine that the defendant violated the conditions or covenants of the lease, and that by reason thereof the plaintiff was unable to rent other portions of said storeroom, whereby plaintiff was damaged in the sum specified. Without encumbering this opinion with a statement of the evidence, it is sufficient to say that we have examined the evidence referred to in the briefs of counsel and are satisfied that it supports the findings.

Appellant claims error by the court in receiving the testimony of the witness Elderton, who testified to the rental value of the premises, as a basis for the award of damages. The claim is that a sufficient foundation was not laid and that the witness did not sufficiently qualify himself, although he stated that he had been familiar with such rental value for eight or nine years and especially the last three or four years; and that the court erred in overruling appellant's objection to the foundation question asked of the witness, which was: "Are you familiar with the rental value in the neighborhood of these premises at 554 South Main Street?" The ruling was correct, and the defendant did not attempt to show that the witness was not qualified, and did not introduce any evidence contradicting his testimony.

The judgment and order are affirmed.

James, J., and Works, J., *pro tem.*, concurred.

[Civ. No. 1823. Second Appellate District.—May 7, 1917.]

MAYBURY RANCH COMPANY (a Corporation), Appellant, v. **WILLIAM DEVENNEY**, Substituted for **ORANGE COUNTY TITLE COMPANY**, (a Corporation), Respondent.

CORPORATION — CONTRACT TO PURCHASE REAL PROPERTY — AUTHORITY OF AGENT.—Where a corporation makes delivery of a sum of money to a person who had on one occasion acted as its agent in the sale of land, with instructions to use the money to bind the bargain on the purchase of certain real property which it desired to acquire, the vendor has the right to assume that such person possessed all necessary authority to complete the transaction, and the corporation cannot thereafter recover the money deposited on the ground of lack of authority of its agent to close the deal upon the terms embodied in the contract which he executed.

APPEAL from a judgment of the Superior Court of Orange County, and from an order denying a new trial. W. H. Thomas, Judge.

The facts are stated in the opinion of the court.

A. L. Rowland, and R. S. Parker, for Appellant.

Williams & Rutan, for Respondent.

JAMES, J.—Plaintiff appeals from a judgment adverse to it and from an order denying a motion for new trial. The suit was brought against the defendant corporation to recover the sum of five hundred dollars as money alleged to have been received from and for the use of the plaintiff. The defendant being an escrow-holder, William Devenney was substituted in its place, upon the defendant paying into court the amount of money involved in the controversy. The case proceeded to trial as against Devenney, who is respondent herein.

Prior to October, 1913, one Cook was a person well known to the plaintiff corporation; he had served in their employ as superintendent of ranch properties, and on one occasion had acted as agent in the sale of forty acres of land belonging to the plaintiff. Devenney controlled in some quality of ownership 189 acres of land located in the county of Orange, which was considered to be suitable for the growing of sugar beets. The plaintiff company desired to acquire this land, and were told by Cook that he could secure it at a price of three hundred dollars per acre. The president and vice-president of the plaintiff corporation had visited and viewed the land and were satisfied with it. On about the 13th of October, 1913, the vice-president of the plaintiff company delivered to Cook, on behalf of the company, his personal check for the sum of five hundred dollars, with direction to Cook to use the money to bind the bargain on the purchase of the property mentioned; the direction being, however, that this money was to be paid into the Orange County Title Company in escrow, pending the bringing down of the title and the making of a contract of purchase. Cook followed the direction given him and deposited the money with the Title Company and secured a contract from Devenney and persons interested with him, which contract was drawn by the escrow officer of the Title Company. The contract so drawn provided for an initial payment of seven thousand dollars to be made, the five hundred dollars being a part thereof, the re-

maining six thousand five hundred dollars to be paid within twenty days; and thereafter the balance of the purchase price was to be paid at the rate of five thousand dollars per year, with interest. The contract did not in terms entitle the vendee to a deed and a showing of clear title until the full amount of the purchase price had been paid. The plaintiff, through its officers, after the deposit had been made and the contract executed, insisted that it was entitled to have a deed given it and to give a mortgage back, and have a clear title shown upon the completion of the first payment of seven thousand dollars. In the evidence of these officers given at the trial they denied any authority in Cook to stipulate for any other conditions as to payments, deed, mortgage and title. They tendered the six thousand five hundred dollars to the Title Company and made demand for a deed, which demand was refused as not being within the terms of the contract. This action was then brought. There was some testimony given by the escrow officer of the Title Company from which the court might have properly concluded that when the demand for a deed was made by the plaintiff, plaintiff's contention was rather upon the matter of the construction of the contract as made than upon the contention of any lack of authority in Cook to close the deal upon the terms so embodied in the contract. It did appear in evidence that Cook was to receive a commission from Devenney (the escrow instructions so recited), and by fair inference from the evidence it may be said that the plaintiff's officers were advised of that fact. In delivering the check for five hundred dollars to Cook it seems very clear that the plaintiff was not making a payment to Cook as the agent of the vendor; the money was delivered to Cook to be by him deposited with the Title Company to close the transaction. That for such purposes Cook acted as the agent for the plaintiff can hardly be denied. Being authorized to deposit the money and so close the deal, we think that Devenney had the right to assume that Cook possessed all authority necessary to complete the transaction in the way it was. Devenney was not put upon notice of any limitation on the authority of Cook. The money was paid on account of the purchase price, and a receipt taken therefor from the vendor, and a contract drawn binding the vendor to convey upon terms which were indicated by Cook to be satisfactory to the vendee. Under such condition of the evi-

dence we think the trial court was justified in denying to the plaintiff judgment for the recovery of the five hundred dollars.

The judgment and order are affirmed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

[Civ. No. 1645. Second Appellate District.—May 8, 1917.]

M. E. SMALLEY, Respondent, v. H. R. HOLT et al., Appellants.

EXCHANGE OF REAL PROPERTY—RECOVERY OF MONEY PAID—INABILITY TO PERFORM—SUPPORT OF FINDING—APPEAL.—In an action to recover a sum of money paid under an agreement for an exchange of real property, which provided that if the other contracting party was unable to comply with the terms of the agreement within a reasonable time, and within thirty days from the date of the payment of the money, the amount was to be returned without interest, a finding of such failure, and that the inability to perform was not owing to any conduct of the plaintiff, will not be disturbed on appeal, where there was evidence to support it, regardless of whether the same was established by a preponderance of the evidence.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge.

The facts are stated in the opinion of the court.

R. W. Richardson, and Eugene A. Tucker, for Appellants.

John W. Ballard, and Clyde Bishop, for Respondent.

WORKS, J., *pro tem.*—This is an appeal from the judgment.

On June 29, 1911, respondent and appellant Holt entered into an agreement for an exchange of real property, together with the passing of certain mortgages and cash considerations as a part of the trade. The sum of three thousand dollars was agreed by respondent to be paid to Holt when certain abstracts and certificates of title were brought down to date,

and it was further provided, “\$750.00 in cash is to be paid to H. R. Holt on this agreement on or before July 3rd, 1911, which amount is to be credited and taken out of the \$3,000.00 hereinbefore mentioned in this agreement.” On July 1st Smalley paid to appellants the sum of \$750 and they executed to him a document in the following form:

“Received from M. E. Smalley the sum of seven hundred and fifty dollars, which is the first cash payment mentioned in contract made and dated June 29th, 1911, by and between H. R. Holt and M. E. Smalley.

“It is hereby distinctly understood and agreed by H. R. Holt and Florence M. Wendell that in case said Holt is unable to comply with the terms of said contract within a reasonable time and within thirty days from this date, the said \$750.00, without interest is to be returned to M. E. Smalley.”

Florence M. Wendell was a party to the receipt, and is a party to the action only because the property agreed in the first contract to be conveyed to Holt was actually to be conveyed to her to hold for him.

The action was commenced to recover the \$750 paid to appellants, upon the ground that Holt was unable, up to the time of filing the complaint, which was on September 11, 1911, to comply with the terms of the original agreement by him to be performed. The complaint alleges that Smalley kept and that Holt did not keep all the covenants of the contract of June 29th by them respectively to be performed, thus apparently holding to the idea that the action was based upon that contract. The trial court found for respondent on these issues, and appellants insist that the finding is not supported by the evidence. Respondent rejoins that the allegation of his performance and of Holt’s nonperformance under the contract of June 29th was surplusage and therefore immaterial, that the action is really based on the paper executed July 1st, and that the complaint states and the evidence proved a cause of action under it. Upon which of these agreements was the cause of action founded?

It seems plain that the paper, receipt, or agreement of July 1st displaced the provisions of the contract of June 29th as to the payment of the \$750. Under the earlier arrangement it was to have been paid as a part of a total sum of three thousand dollars, which was a part of the consideration for the trade; under the later it was made as a payment which

might or might not be retained by Holt, depending upon whether he could comply with the main contract within thirty days. The two arrangements concerning the \$750 were inconsistent, and the first was abrogated by the second. The cause of action was therefore on the latter, and the allegations concerning performance under the former were immaterial.

The appellant claims that the agreement of July 1st, in the respect that it provided for a possible return of the \$750, was void for want of consideration, but the defense is not pleaded and it is not open to appellant without a pleading to support it.

The trial court found that appellants, "for thirty days next after" July 1, 1911, "failed to comply with the terms" of the two agreements "and were at all times wholly unable to do so." It was further found that this inability to perform was not owing to any conduct of the respondent. In objecting to these findings, and to the others above mentioned, appellants continually insist that Smalley did not prove his case by a preponderance of the evidence, but that point is utterly devoid of interest here. The question on appeal is not where the preponderance of the evidence on a given issue lies, but whether there is any evidence whatever in support of the finding upon it. This point has been so often decided that it is as well settled as any question in the jurisprudence of California. It is mentioned now only because of the insistent and lengthy argument of appellant upon it. We will assume that appellant has presented the only question which could be presented on appeal in this regard; that is, does the evidence support the findings from which quotation has just been made? We have examined the record and answer the question in the affirmative. In fact, they find partial support in the admissions in the answer.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 683. First Appellate District.—May 9, 1917.]

In the Matter of BYRD WILSON WENMAN, JR., on Habeas Corpus.

DIVORCE—AWARD OF CUSTODY OF MINOR—JUDGMENT—VALIDITY IN OTHER STATES.—The doctrine of comity between the states of the Union requires that a judgment granting a divorce and awarding the custody of a minor child rendered by a court of one state shall be conclusive in the jurisdiction of the other states, in the absence of a showing of changed conditions affecting the welfare of the child.

ID.—VIOLATION OF DECREE OF FOREIGN STATE—DUTY OF COURTS OF THIS STATE.—Upon an application for a writ of *habeas corpus* to recover the custody of a minor child brought into this state by its mother, in direct violation of the terms of a decree of a court of competent jurisdiction of another state awarding its custody to the petitioner, a due respect for the orderly administration of the law, and according to the doctrine of comity, requires the courts of this state to recognize the right of the petitioner under the decree of the foreign court, in the absence of any showing that since the entry of the decree the petitioner had become an unfit or unsafe person to have the care and control of the minor.

APPLICATION for a Writ of Habeas Corpus originally made to the District Court of Appeal for the First Appellate District to recover the custody of a minor.

The facts are stated in the opinion of the court.

Garret W. McEnerney, Gavin McNab, R. P. Henshall, and Andrew F. Burke, for Petitioner.

Sullivan & Sullivan and Theo. J. Roche, Hiram W. Johnson, Jr., and Archibald M. Johnson, for Respondents.

THE COURT.—This is a proceeding in *habeas corpus* brought to recover the custody of a minor child alleged to have been abducted and at present unlawfully detained. The writ having issued, a return was made thereto by the person detaining the child, and the matter is before us for decision upon demurrer to the return.

In May, 1914, in the state of Connecticut, the parents of the child—a boy now seven years of age—were divorced, and his custody was by the decree awarded to the petitioner, the

father, with the right to the mother to visit her son twice a week at his father's home in the state of Connecticut, and to be given his custody during certain vacation periods each year. That decree was subsequently, in the month of June, 1915, modified by consent of the parties, and as modified provided that the mother should be permitted to visit the boy at his father's said home twice a month, remaining all day, and that he should be permitted to be with his mother at the home of her parents on Easter Sunday and Christmas day of each year, to remain overnight, and to be returned to his father on the following day as soon as reasonably convenient.

In the closing days of December, 1916, the boy's mother (who is the respondent in this proceeding) "abducted and kidnaped" him, says the petition, and caused him to be taken out of the state of New York, where he was at the time visiting her, and brought to the state of California. The child's parents at the time of the entry of the decree were residents of Connecticut. The mother has since remarried and become a resident of the state of New York, and at the time of the alleged abduction the petitioner with the child was temporarily residing in that state.

Kidnaping is denounced as an offense against the law both in Connecticut and New York; and when committed in another state and the person kidnaped is brought into the state of California, is a continuing offense and punishable in this state. (Pen. Code, secs. 207, 208.)

The doctrine of comity between the states of the Union requires that a judgment granting a divorce and awarding the custody of a minor child rendered by a court of one state shall be conclusive in the jurisdiction of the other states, in the absence of a showing of changed conditions affecting the welfare of the child. (*State ex rel. Nipp v. District Court*, 46 Mont. 425, [Ann. Cas. 1916B, 256, 128 Pac. 590].)

In the case of *Hartley v. Blease*, 99 S. C. 92, [82 S. E. 991], it was held in a proceeding similar to this that where in a suit for divorce the husband was granted the custody of a minor child of the marriage, who was subsequently kidnaped by the wife, the decree itself was evidence of the husband's moral fitness to care for the child; and that unless his conduct since the rendition of the decree had been such as to render him an unfit guardian he should, in a proceeding for the recovery of the child, be awarded his custody.

Some of the more important matters with which the respondent charges the petitioner in her return are alleged to have existed prior to and at the time of the entry of the decree of divorce. As to them, we think it evident that the decree is conclusive, and that this court cannot now re-examine them for the purpose of depriving the petitioner of a custody therein awarded to him. Other matters set forth in the return consist of alleged discourtesies to the respondent on the part of the petitioner when visiting the child; of failure to permit the child to remain overnight with her twice a year as in the modified decree provided; of failure to notify her on one occasion when the child was ill, as was required by the terms of the decree. By these and other allegations respondent in effect complains that she has been denied in a large measure the enjoyment of the society of her child contemplated by the decree.

Without stopping to consider that these matters are alleged to have occurred not in California, but at the domicile of the petitioner and minor in the state of Connecticut, or near there in the state of New York—where evidence concerning them is accessible, and where a proper enforcement of the decree may be readily had—they have little or no bearing on the question of the fitness of the petitioner to have the care and custody of his minor child, even if we concede for the sake of argument that under the circumstances existing in this case the courts of California would be warranted in assuming jurisdiction, and determining under the facts as they exist to-day who is entitled to such custody. It is shown by the record before us that the minor was brought to this state by the respondent in direct violation of a decree of a court of competent jurisdiction of a sister state awarding its custody to the petitioner. The child's presence here is founded on a tort or offense against the law, and it is not made to appear that since the entry of the decree under which the petitioner is now claiming he has become an unfit or unsafe person to have the care and control of his minor child; and it is admitted—at least tacitly—by the respondent in her return that she could not establish her right in the courts of Connecticut or New York, to the relief which, three thousand miles away from the place where the difficulties between the parties arose, she hopes to get in the courts of this state. Under these circumstances we think there is no question but

that a due respect for the orderly administration of the law, and according to the doctrine of comity among sister states, requires this court to recognize the right of the petitioner under the decree of the court of the state of Connecticut hereinbefore referred to, to the custody of Byrd Wilson Wenman, Jr., the said minor.

It is therefore ordered that said respondent Louise Ladew Nave, forthwith deliver to the petitioner, Byrd Wilson Wenman, Sr., the said minor child of petitioner and respondent.

[Civ. No. 1812. Second Appellate District.—May 9, 1917.]

MARGARET WARD, Respondent, v. HARRY X. GOETZ et al., Appellants.

HUSBAND AND WIFE—SEPARATION CONTRACT—RECOVERY OF MONTHLY PAYMENTS—WAIVER—EVIDENCE—APPEAL.—In an action to recover upon an agreement made between a husband and wife, providing for their living apart, the dismissal of a pending action for separate maintenance and the payment to the wife of a stated monthly sum so long as they should remain married, the finding of the trial court upon sufficient evidence that the wife had not waived her right to such payments is conclusive on appeal.

Id.—ESTOPPEL—PLEADING.—In such an action, where it is claimed that the wife was estopped to claim such payments, it is essential that the estoppel be pleaded.

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge.

The facts are stated in the opinion of the court.

Ben S. Hunter, and Emmett W. Miller, for Appellants.

Wesley H. Beach, and Chas. C. Polk, for Respondent.

WORKS, J., *pro tem.*—This is an appeal from the judgment.

The appellant Goetz and the respondent were formerly husband and wife. Some time prior to February 16, 1911, the respondent commenced an action for separate maintenance against her husband. On the date mentioned the two entered

into an agreement to live apart, the instrument also providing for a dismissal of the maintenance suit, and for the payment by the husband to the wife of the sum of fifty dollars each month, so long as they should remain married. As a part of the same transaction the appellant Goetz, as principal, and the appellant Nebeker, as surety, executed to respondent a bond in the sum of one thousand dollars, securing the payment of the monthly installments. In December, 1913, respondent obtained a divorce by decree of a Nevada court and her maiden name of Ward was restored to her. With the payment of January, 1913, Goetz ceased meeting the installments agreed by him to be paid to his wife, and this action was commenced to recover on the bond for the payments due from that time forward. The plaintiff had judgment.

The first contention made by the appellant is that Miss Ward has waived her right to collect the installments and that she is estopped to claim them. It appears that there was pending in California a suit for divorce brought by the husband at the same time that the Nevada action was in the courts of that state. One C. N. Gary, a Nevada lawyer, was counsel for the wife in the action in that jurisdiction. At a certain stage of the Nevada litigation Gary became fearful that the California case might first reach a conclusion and wrote Ben S. Hunter, Goetz's California lawyer, as follows:

"I will procure from Marguerite W. Goetz and deliver in escrow an agreement that in the event that a continuance for 2 days be stipulated in the action of *Goetz v. Goetz* pending in the Sup. Ct. of L. A. County, California, she will release Harry X. Goetz from all liability for back payments or alimony under the property settlement made at the close of the former litigation."

After the writing of this communication Gary had a conference with Hunter in Los Angeles about the proposed continuance of the California case, and a continuance was then had, although there was no agreement delivered in escrow, or ever entered into, by Miss Ward releasing Goetz from his liability to pay the monthly installments. Nevertheless, it is claimed that a waiver and an estoppel arose against respondent because of the granting of the continuance, following upon the letter from Gary and the conference between him and Hunter. It is not necessary to proceed to the discussion of legal questions in connection with the claims of

waiver and estoppel. We need not be concerned as to whether Gary had authority to act for Miss Ward in the premises. The letter certainly was not a waiver of her right to the installments, granting that he had such authority. Whether a waiver resulted from the conference between Gary and Hunter, again granting Gary's authority, depends upon what was said there, and the finding of the trial court is with respondent on that question. That finding is amply supported by the testimony of Gary, and Hunter did not take the stand. As to the question of estoppel, it is enough to say that no estoppel was pleaded. (*Carpenter v. Markham*, 172 Cal. 112, [155 Pac. 644].)

The trial court found that the parties had stipulated in open court "that the only issue to be tried was whether the plaintiff had waived her right to said monthly payments from and after the fifteenth day of January, 1913," and exception is taken to the finding as not supported by the evidence. The point is without merit. Soon after the trial commenced and immediately after respondent had testified that Goetz's last payment to her was the one due on the day mentioned in the finding, counsel for appellants volunteered the following statement, "There is only one question, as I understand, and that is whether she has waived future payments. The fact that the agreement was executed and the action that was then filed was dismissed is admitted." To this remark counsel for Miss Ward responded, "All right," and proceeded with the examination of the witness. The colloquy between counsel was in effect a stipulation and the language of the finding is a correct presentation of the actual occurrence.

The appellant objects to certain rulings of the trial court in admitting and excluding evidence, but it appears to us that none of them was erroneous.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 372. Third Appellate District.—May 9, 1917.]

THE PEOPLE, Respondent, *v.* JEFF MABRIER, Appellant.

CRIMINAL LAW—CHANGE OF PLACE OF TRIAL—BIAS AND PREJUDICE—

APPEAL.—An application to change the place of trial of a criminal action on the ground that, owing to the bias and prejudice against the defendant throughout the county, the defendant could not have a fair and impartial trial therein, is addressed to the sound discretion of the trial court, and where error is assigned, a clear case should be shown by the record, or the appellate court will not interfere.

ID.—IMPANELMENT OF JURY—DISCLOSURE OF FACTS WARRANTING RE-NEWAL OF MOTION—PROCEDURE.—Where facts are disclosed at the impanelment of the jury which would warrant a renewal of the motion for a change of the place of trial, such renewal seems to be a proper proceeding.

ID.—EXAMINATION OF JURORS—UNWARRANTED INFERENCE OF BIAS.—An inference of bias and prejudice against the defendant throughout the county is not warranted from the fact that ten out of thirty-nine talesmen examined in a county having a population of about six thousand were shown to possess such bias and prejudice.

ID.—OPINIONS OF JURORS—CONTRADICTORY ANSWERS—DUTY OF TRIAL COURT.—In the impanelment of a jury where talesmen give contradictory answers to questions as to their ability to disregard opinions which they have formed as to the defendant's guilt based upon newspaper reports and public rumors, it is the duty of the trial court to decide which of the answers most truly show the jurors' minds, and its decision is binding on the appellate courts.

ID.—EVIDENCE—CHANGE IN TESTIMONY—IMPEACHMENT—FOUNDATION.—In a criminal action a witness who testified differently at the trial from what he testified to upon a former trial cannot be impeached by the introduction of his former testimony, where no foundation was laid for such impeachment while he was on the witness-stand.

APPEAL from a judgment of the Superior Court of Modoc County, and from an order denying a new trial. Clarence A. Raker, Judge.

The facts are stated in the opinion of the court.

Jamison & Wylie, and G. P. Johnson, for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—Information was laid by the district attorney of Modoc County charging defendant with the crime of rape upon a female person under the age of eighteen years. He was convicted by the jury and was sentenced by the court to imprisonment in the state prison for the period of forty-seven years. The appeal is from the judgment of conviction and from the order denying motion for a new trial.

The sufficiency of the evidence to justify the verdict is not called in question. The point most strongly urged for a reversal is that the court erred in denying defendant's motion, made under section 1033 of the Penal Code, to change the place of trial to some county other than Modoc, on the ground that, owing to the bias and prejudice against him throughout the county, defendant could not have a fair and impartial trial in that county.

It appeared that defendant's conviction was upon the third trial for the same crime, and that at the two former trials there were disagreements, the jury standing eleven for conviction and one for acquittal. An application for the change of the place of trial was made and denied before the second trial and again before the third trial began. The application was also made and denied after defendant had exhausted his peremptory challenges but before the jury was completed. The second and third applications were made upon affidavits, newspaper clippings, and the record in the case used at the hearing of the first application, the only additional matter being a newspaper article published after the second trial. It was shown that the comment upon the former trial by the three principal newspapers published in Modoc County were of such character as would have a tendency to prejudice the readers of these papers against defendant in so far as newspaper articles might influence their readers, and it appeared that these papers circulated very generally throughout the county and were read by many people, and, in affidavits submitted at the hearing, the opinion was expressed that these newspaper articles had created such a widespread feeling of bias and prejudice against defendant as to prevent his having a fair and impartial trial in Modoc County. Affidavits of citizens residing in different parts of the county were read, in which affiants stated that they had talked with many residents of the county and from what they had learned in these conversations they were convinced that defendant could not

have a fair trial in that county. Counter-affidavits were submitted by the people stating that affiants were widely acquainted with the residents of the county and had talked with many people in various parts of the county since the first trial, and that they, affiants, "had no knowledge of any bias or prejudice existing against defendant in said county or among the citizens of said county," and from their knowledge derived from meeting and talking with citizens of the county, affiants expressed the opinion "that defendant could have as fair a trial in Modoc County as elsewhere."

The statements in the affidavits, both in support of and against the motion, were by persons having apparently equal opportunity to form an opinion as to whether or not a fair trial could be had in Modoc County. Specific instances of persons having been or being influenced adversely to defendant by the newspaper articles referred to are wanting. No affiant mentioned the name of any person with whom he had talked or that any named person exhibited hostility to defendant; nor did any affiant furnish the court with facts from which the court could intelligently determine the value to be given to the opinion of affiant. This is equally true of all the affidavits, for they are but the expression of opinions and conclusions of affiants, "after having talked with many citizens of the county." The newspaper clippings show that they went much beyond a report of the evidence, condemning by name in severe terms the juror who voted for acquittal. In one of these newspapers it was stated that the district attorney had "the case of this juror under advisement and an example may be made of him." But the affidavits did not make clear that these comments of the newspapers had so poisoned or influenced the minds of the citizenry of the county generally as to make it unlikely that a fair and impartial trial could be had in that county.

Applications such as this are addressed to the sound discretion of the trial court, and, as was said in *People v. Goldenson*, 76 Cal. 328, 339, [19 Pac. 161, 166]: "Where error is assigned a clear case should be shown by the record, or this court will not interfere. The court below was then in a better position to weigh the statements of the parties and to determine the truth than this court is now."

Where facts are disclosed at the impanelment of the jury which would warrant a renewal of the motion for a change

of the place of trial, such renewal seems to be a proper proceeding. (*People v. Staples*, 149 Cal. 405, 412, [86 Pac. 886].) Our attention is called to the fact that "at this trial thirty-nine talesmen were examined before a jury of twelve men to try the defendant were secured. Ten of these talesmen whose residences are scattered throughout Modoc County swore upon their *voir dire* that they could not give the defendant a fair and impartial trial, on account of their bias and prejudice." It is stated that the population of Modoc County is about six thousand. It does not appear to us that the number of talesmen examined was unusually large or that the fact that ten out of this number disqualifyed themselves on the ground of bias would justify the inference sought to be drawn from it. We cannot say that the court abused its discretion in overruling defendant's motion.

Error of the court is claimed in overruling defendant's challenge for cause against Talesman Osmund Ratcliffe and sustaining plaintiff's challenge against W. C. Clark. Ratcliffe was examined at great length on his *voir dire*, in the course of which he stated that he had formed an opinion in the case unfavorable to defendant and that his "mind was set"; that his opinion was formed from rumors; that he had not talked with any witness in the case nor with any of the former jurors. "Q. And you have made up your mind that if you were accepted as a juryman you would be against him? A. Yes, sir. Q. If you were sworn to try the case you would be against him? A. My mind is made up." At this point the challenge was interposed. In reply to questions by the district attorney, Ratcliffe stated that he had not talked with any witness and had formed an opinion from "current talk." He was asked if he would try the case "upon those rumors, or try it upon the evidence introduced here. A. Well, I don't think there would be any evidence to change my mind at all. . . . Q. Is it your understanding that you are to try the case upon the evidence and not upon rumors? A. Yes, sir. Q. If you were accepted as a juror, wouldn't you try the case upon the evidence? A. Well, I don't know." He testified that if he was himself upon trial he would accept a juror in his frame of mind and that "if the evidence should not be like what he had heard he would go according to the evidence"; that he had no prejudice against defendant personally, and that he "could give the defendant a fair and impar-

tial trial on the evidence. The Court: Do you understand, Mr. Ratcliffe, that when you are sworn as a juror, it is your duty to try the case upon the evidence presented here alone, and not upon public rumor; do you understand that to be the law? A. Yes, sir. Q. If you were accepted as a juror in this case, would you try it solely upon what you hear in court, upon the evidence only? A. Yes, sir; I would have to." He also testified that notwithstanding any opinion he then had he would lay aside that opinion and try the case solely on the evidence. "Mr. Jamison (Defendant's Attorney): Q. Mr. Ratcliffe, if that opinion is in your mind, it is a strong opinion, and it would go with you into the jury-box, and after they began to introduce evidence, would it not? A. No, I think I could go according to the evidence. Q. But you would have that opinion until sufficient evidence has been introduced to overcome it? A. Yes, sir. Q. You have a strong fixed opinion in your mind that this defendant is guilty? A. No, I could not say that. Q. Do you think you could lay that opinion aside and try the case wholly on the evidence, or would that opinion influence you? A. No, I don't think so. I don't think it would influence me. The Court: The challenge is disallowed." Ratcliffe was still further interrogated: "Mr. Wylie (Defendant's Attorney): Q. Mr. Ratcliffe, do you understand that under the law a man is presumed to be innocent until his guilt is proven? A. Yes, sir. Q. Would you accord the defendant the benefit and protection of that law if you were accepted as a jurymen? A. Yes, sir. Q. Would you insist that the people in this case prove his guilt to a moral certainty and beyond a reasonable doubt before you find him guilty? A. Yes, sir. Q. And you will do so? A. Yes, sir. Q. Will you try this case on the evidence and nothing else? A. Sure. Q. Will you take the law regulating and controlling this case from the court, as instructed by the court from his instructions? A. Yes, sir. . . . Q. Will you try this case irrespective of outside opinion or what the public might say? A. I would act according to the evidence." Ratcliffe was one of the first twelve called to the jury-box and was peremptorily challenged by defendant.

In the case of *People v. Ryan*, 152 Cal. 364, 371, [92 Pac. 853, 856], certain jurors impaneled to try the case gave contradictory answers upon the subject of their ability to disregard opinions as to defendant's guilt, which they had formed

from newspaper reports and public rumors. Said the court: "Many persons, competent as jurors, have not given much attention to such subjects, are inexperienced as witnesses, and are unable readily to comprehend the force and effect of the language in which such questions are couched, and they generally answer without reflection as to the effect of their own words. Such contradictions are by no means infrequent, if, indeed, they are not the rule, rather than the exception. The trial court must decide which of the answers most truly shows the juror's mind. It should, of course, be liberal in giving the defendant and the people the benefit of any doubts that may arise as to the fairness of the juror or his ability to lay aside preconceived impressions and should excuse the juror if such doubt is created. But where there are such contradictions, its decision is binding upon this court." (Citing cases.)

It is urged that the examination of Juror Clark showed a similar state of mind to that of Ratcliffe's, except that he had formed an opinion favorable to defendant and that to be consistent the court should have refused the district attorney's challenge of Clark for cause. What was said as to the ruling in Ratcliffe's case applies to Clark's. The trial court was charged with the duty of resolving the contradictions in the answers of these jurymen and "its decision is binding upon this court." The foregoing will apply equally to Jurymen Dannhauser and McDaniels, the latter having been called as a juror after defendant had exhausted his peremptory challenges.

Error is assigned because of the refusal of the court to allow defendant's attorney, Wylie, to testify that he had a conversation with the father of the complaining witness the day after the alleged assault, "about having an examination of Mary to determine whether or not sexual intercourse had been had with her"; and whether or not at the preliminary examination of defendant he applied to the court for an examination of this kind by a competent physician. The record shows that, upon stipulation of counsel and by order of the court, eight days after the alleged offense was committed, such an examination was made by three physicians and their testimony appears in the record. We see no prejudicial error in the ruling.

The witness, Frank Hardin, a boy of fifteen years of age, testified at a former trial that he followed the defendant and

the prosecuting witness and saw them at the place where the crime was alleged to have been committed, and that nothing of the kind happened there. When called at the present trial, to the disappointment and surprise of defendant's attorney, he said he was not at this place, and admitted that he did not tell the truth at the former trial. Hardin left the witness-stand and was not again recalled. Attorney Wylie was sworn and asked to state whether or not, just before being called as a witness, Hardin had not stated that his testimony would be the same as at the former trial. Objection was made and sustained that no proper foundation for Hardin's impeachment had been laid. An offer was then made to introduce the testimony of Hardin given at the last trial. The ruling was not error. No foundation was laid while Hardin was on the stand as a witness for his impeachment. The reading of his former testimony was properly refused. To have warranted its being read to the jury, Hardin's attention should have been called to it, and he should have been asked if he made the answers theretofore given by him. Upon his denial it would have been permissible to show that he testified as claimed by defendant at the former trial.

Witness L. F. Gill was called by defendant and the following questions were asked: "Q. I will ask you to state whether or not at that time he stated to you that he had followed Jeff Mabrier and Mary Ostrom across the field, where they had gone to the place where it is alleged that the rape was committed upon the girl, and that no such act had been committed. Q. I will ask you what he told you or said to you in reference to the act charged in this case and whether such act had been committed or not." Objection that no proper foundation had been laid and that the questions were incompetent, immaterial, and leading was sustained. Clearly, inasmuch as no question had been asked the witness Hardin which would serve as a foundation for the impeaching questions propounded, the court properly sustained the objection.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 5, 1917.

[Crim. No. 366. Third Appellate District.—May 9, 1917.]

**THE PEOPLE, Respondent, v. RICHARD W. FEALY,
Appellant.**

CRIMINAL LAW—INDICTMENT—SUFFICIENCY OF EVIDENCE—QUESTION NOT REVIEWABLE.—While it is true that section 919 of the Penal Code provides that the grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence, and while it is also true that section 921 declares that such body ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction, yet, there is no method provided for revising the action of the grand jury in finding an indictment on the ground that there was not sufficient evidence to support it.

ID.—BURNING OF INSURED BUILDING—CONSPIRACY—EVIDENCE—STATEMENTS AND TRANSACTIONS OF CONFEDERATES.—Where, in a prosecution for the crime of burning an insured building with intent to defraud the insurance company, the theory of the people at the trial was that the burning was the climax of a conspiracy concocted by the defendant, his wife, other members of his family and a third party, it is proper to admit conversations and transactions of the alleged conspirators relative to the conspiracy after its formation and before the consummation of its object, regardless of whether the defendant was present when they occurred.

ID.—DEFENDANT AS A WITNESS—IMPEACHMENT OF CHARACTER.—Where a defendant in a criminal case testifies in his own behalf, he for the time being removes from himself the character of a defendant, and takes on that of a witness, and his character as a witness for truth, honesty, and integrity may be impeached like that of any other witness.

ID.—CONSIDERATION OF TESTIMONY OF DEFENDANT—EVIDENCE—HARMLESS ERROR.—An instruction that the jury should fairly and impartially consider the testimony of the defendant, and if it produced conviction, they should act upon it, otherwise they might reject it, is not prejudicially erroneous, where the evidence of the defendant's guilt is clear and convincing.

ID.—CIRCUMSTANTIAL EVIDENCE—INSTRUCTION.—An instruction that circumstantial evidence may consist of incriminatory admissions made by one accused of crime, plans laid for the commission of the crime by the accused, such as putting himself in a position to commit it—in short, any act, declaration, or circumstance admitted in evidence tending to connect the accused with the commission of the crime—is not an instruction on matters of fact.

APPEAL from a judgment of the Superior Court of Napa County, and from an order denying a new trial. Henry C. Gesford, Judge.

The facts are stated in the opinion of the court.

E. S. Bell, Charles J. Heggerty, and Knight & Heggerty, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant was indicted by the grand jury of Napa County for the crime of "willfully and feloniously burning, injuring, and destroying property with the felonious intent to injure, prejudice, damage, and defraud the insurer" of said property. Thereafter he was put upon his trial thereunder, and was convicted by the jury of the crime as so charged, and he appeals from the judgment of conviction and the order denying him a new trial.

The law upon which the indictment was founded is to be found in section 548 of the Penal Code, whose language is as follows:

"Every person who willfully burns, or in any other manner injures or destroys any property which is at the time insured against loss or damage by fire or by any other casualty, with intent to defraud or prejudice the insurer, whether the same be the property of or in possession of such person or of any other, is punishable by imprisonment in the state prison not less than one nor more than ten years."

Following what is conceived to be the more orderly course in this case, the story of the alleged crime, as it was developed by the evidence, should first briefly be narrated.

It should first be explained that the theory of the people at the trial and in the prosecution of the defendant was that the burning of the building was the climax of a conspiracy concocted by Fealy, his wife, other members of his family, and one Will Dodson, and that the motive for the act was to secure the insurance which had been placed upon the building and its contents.

The crime charged was committed on the twenty-third day of September, 1913, at about 8 o'clock in the evening. The property alleged to have been set on fire and burned by the

accused was a dwelling-house, situated at the corner of Hudson Avenue and Main Street, in the city of St. Helena, Napa County. This property was originally owned by Mrs. Mary Center, the mother of Mrs. Laura Ida Fealy, wife of the defendant. Mrs. Laura Ida Fealy at the time of her intermarriage with the defendant, on the twelfth day of June, 1910, was a widow, having previously been the wife of one Gisin, by whom she had two male children, Ernest and George, aged, respectively, at the time of the trial, about twenty-two and twenty-four years.

Mrs. Center conveyed the property in question to her daughter, Mrs. Fealy, on the first day of November, 1910. This conveyance was a deed of gift, the expressed consideration being love and affection. On the eighteenth day of July, 1913, Mrs. Fealy conveyed said property, by a deed of grant, bargain, and sale, for the nominal consideration of ten dollars, as expressed in said deed, to said Will Dodson, a resident of the city and county of San Francisco. On the eleventh day of November, 1915, said Dodson reconveyed the property to Mrs. Fealy.

The facts above recited concerning the several transfers of the property prior to the burning of the building and the retransfer of said property by Dodson to Mrs. Fealy after the burning are, as may readily be apprehended, established by record evidence, as to the verity of which no question is raised. Further facts of the case, a brief statement of which, following an orderly course, is to follow, are reasonably deducible from the evidence as presented, and show quite conclusively that the verdict is well supported, although, it is to be remarked, there is evidence in the record which, if believable, would support a conclusion the reverse of that evidenced by the verdict.

For several years prior to and at the time of the fire, on the twenty-third day of September, 1913, the defendant and his wife, together with the latter's mother, Mrs. Center, and two sons, Ernest and George Gisin, resided in the house in question. Upon the said property there then subsisted an encumbrance amounting to a trifle over four thousand dollars. On various occasions the members of the family above referred to discussed their financial affairs, and it was finally suggested by the defendant that the better way to relieve themselves of their financial obligations and burdens would be to burn the property, secure the insurance, and with the money so ob-

tained pay off their indebtedness and, with the balance of the money, set themselves up in the ranching business. This proposition was frequently discussed among the members of the family, and on several occasions when Thomas Fealy, a brother of the defendant, was present. As a part of the scheme thus proposed, the property was, as above shown, transferred by Mrs. Fealy to Dodson. The insurance on the house at the date of this transfer stood in the name of Mrs. Center, the mother of Mrs. Fealy. Upon the conveyance of the property to Dodson, the latter, accompanied by Mrs. Fealy, went to the local agent in St. Helena of the companies issuing the policies of insurance on the property, and had the insurance transferred to Dodson, Mrs. Fealy at the same time explaining that she had transferred the property to Dodson. On this same occasion Dodson applied for and received additional insurance of one thousand five hundred dollars on the contents of the house, that is, the furniture and other household equipments. As the property then stood, the aggregate insurance on the house and its contents amounted to the sum of nine thousand dollars, of which the sum of six thousand dollars was on the house and the balance, three thousand dollars, on the furniture and other contents. There is evidence tending to show, and which, in fact, if believable, does show, that the house, which was a frame two-story building and, with the exception of a small addition built to it in recent years, an old structure, was of no greater value than of the sum of three thousand five hundred dollars. It is not seriously claimed that the furniture and other contents of the building were not of the value of the sum for which they were insured, *viz.*, three thousand dollars.

After the last-mentioned transaction was consummated, the defendant and his brother proceeded to remove the furniture and other household paraphernalia from the building to the home of the defendant's father, Thomas F. Fealy, Sr., near Rutherford, Napa County, and distant about six miles, north-easterly, from the Hudson Street property, or the property that was burned. The bulk and the most valuable of the furniture, carpets, silverware, kitchen utensils, and dining-room equipments were by degrees or at near intervals so taken to the senior Fealy's home and there stored. The defendant then placed in the burned house a quantity of old furniture,

which was of very little value, and scattered it about the house in the several rooms in irregular order.

The building was only partly damaged, the fire having been observed and an alarm thereof given in time to enable the fire department and citizens of the town to get to the building before the fire had made much progress or gained any considerable headway. After the flames were extinguished an examination of the interior of the house very plainly disclosed that some four or five fires, originating in different rooms and parts of the building and independently of each other, had started. One of these fires was started in the attic of the building. It was further discovered that large-sized holes had been punched into the walls of some of the rooms, the plastering and lathing having thus been broken in at a number of different places. Into these holes there had been placed or stuffed a large quantity of old newspapers, excelsior, evidently taken from an old, dilapidated lounge found in one of the rooms, and other like inflammable materials.

The house was lighted by electricity furnished by a local power company. There were two or three kerosene oil lamps in the house, but these were used only when the lighting system was temporarily out of repair or in defective condition for brief periods, as from heavy rain or wind storms. It was shown by an expert electrician who was thoroughly familiar with the electric wiring of the house, and who minutely examined the wires and their connections immediately after the fires in the house had been extinguished, that it was absolutely certain that the fires were not caused, either directly or indirectly, by the electrical currents transmitted to and through the wires or from electricity at all.

That a large quantity of the most valuable contents of the house upon which insurance had been placed was removed therefrom at different times by the defendant prior to the fire seems to have been very clearly shown. The Gisin brothers, or at least one of them, testified to seeing the defendant take the furniture from the house, load it into a wagon, and haul it away, and that they subsequently saw it at the home of the elder Fealy. The boys were corroborated by other witnesses, who saw the wagon loaded with furniture leaving the Hudson Street house, and by the statement of the defendant himself to one of said witnesses that, Dodson having bought the house and realty, he (defendant) was moving

the furniture away to be stored until such time as he could settle upon a farm which he intended quite soon to take over. In fact, the circumstance of the removal of the furniture from the Hudson Street house to the home of the defendant's father seems to have been quite conclusively shown by the production in court at the trial of the furniture, etc., itself, it having been further shown in this connection that the officers of the law had, under the authority of a search-warrant, found the furniture and taken possession thereof at the home of the elder Fealy.

The Gisin brothers, who claimed to have known, from its very inception, of the scheme to destroy the Hudson Street property by fire, after the removal of the contents of the building therefrom, but who declared that they were forced to secrecy concerning said scheme by threats of the defendant that, if he went to jail for the crime, they (the Gisin boys) would go with him, gave exceedingly damaging testimony against the accused. From the testimony of the one or the other or both, these facts were elicited: That at some time prior to the fire, one of the streets upon which the building abutted was plowed and torn up, preparatory to the bituminizing thereof, and that, while the street was in that condition, the defendant remarked to one of the boys that "this would be a good time for the fire, as the fire-engine could not get down near the house and put the fire out"; that, just preceding the date of the fire, the water connection of the premises with the city water-mains was disconnected by the defendant, and this for the avowed purpose of circumventing any efforts which might be found requisite properly to combat and extinguish the fire; that, on the night of the fire, the large water-tank maintained on the premises was dry or without even a trace of water therein; that several days before the fire, the defendant was in one of the rooms of the house, engaged in experimenting with burning candles to determine, as he declared to one of the Gisins, how long it would require a lighted candle five inches in length to consume itself or burn to the end; that he said that he intended to use the candles for the purpose of setting fire to the house, by placing them in the holes in the wall into which paper and other readily combustible material had been placed, and in such a position with reference to said material that the candles, being lighted, would in a brief time burn

down to the material and thus set it afire; that, on the evening of the fire, having, according to other witnesses, left the Hudson Street house in a buggy, accompanied by his wife, at about 6 o'clock, the defendant two hours later arrived at the "Farrier place," in Conn Valley, Napa County, where the Gisin boys, Mrs. Center, and a brother of the latter were then temporarily domiciled in an "old shack," as one of the Gisins described the structure; that he told the boys that it was then about time that the house should "go up," and that if they would go up "on the hill" they could probably see the blaze from that point; that the defendant's wife commenced to cry and said, "Yes, he set the house on fire"; that the defendant remained at the Farrier place for a brief time and then went away.

It was shown that, near the hour of 10 o'clock that night, the defendant appeared at the Hudson Street house while many of the people that had been attracted to the place by the fire were still there. He had left his wife in the buggy, and himself went into the house, where he met a man named Beck. He asked the latter: "What is the matter—is there a fire?" Beck replied: "Well, you s——n of a b——h, can't you see that the house is on fire?" to which the defendant made no reply, but afterward inquired whether the piano had been saved. Having been told that it was not, he immediately left the house without going into any other room than the living-room, where the above conversation took place.

Some weeks after the fire, Dodson filed with the insurance companies a sworn statement of the loss, and included in said statement was a detailed list of the furniture, pictures, silverware, and other contents of the house, upon which an insurance of three thousand dollars had been placed and which, previously to the fire, had been removed from the house as above indicated and described. The companies carrying the insurance on the house and the contents refused to pay the policies, and thereupon suits were instituted in the superior court for the recovery of the insurance money.

There is a vast amount of other testimony in the record than that from which the foregoing facts are extracted. In fact, the testimony covered a wide range of topics, all bearing in a greater or less degree upon the charge set forth in the indictment, and disclosing and establishing against the accused circumstances of the most incriminatory character,

including statements by the defendant which involved, in effect, admissions of the incendiary origin of the fire and his responsibility therefor. We have, however, briefly stated herein enough of the testimony presented before the jury in support of the charge preferred against the defendant clearly to show that the verdict stands before this court amply supported.

It is not seriously urged here, though, that the conclusion arrived at by the jury as indicated by the verdict is not sustained by the proofs. It is claimed, however, that the defendant was denied a legal trial for these reasons, generally stating them: (1) That a large amount of the evidence presented before the grand jury, and upon which the indictment was founded, was irrelevant and incompetent, and that there was not sufficient competent proof adduced before that body to warrant the finding of the indictment; that therefore the trial court erred in denying the motion of the accused to set aside the indictment; (2) that the court erred in admitting certain testimony to which objection was made by the accused; (3) that the charge of the court involved an erroneous and prejudicial statement of the law in certain indicated particulars. These propositions will now be considered in the order in which they are thus stated.

1. We are not prepared to say that the testimony taken before the grand jury was not of a character to warrant the indictment of the accused. It is true that the investigation before that body was not as full and complete as was the trial, and that many facts and circumstances brought out at the trial were not developed before the grand jury; still, the fact of the removal by the defendant of the furniture, etc., from the house shortly before the fire, the fact that certain oil paintings which had been hung from the walls of the house before the fire and some furniture were found stored in the "tank-house" after the fire, the fact that holes had been bored in the walls and paper and other inflammable materials stuffed in said holes, the fact that several fires, evidently starting independently of each other, broke out in the house and in different rooms, and the fact of the securing of additional insurance on the furniture, etc., which was removed from the house, were all brought to the attention of the inquisitorial body. In addition to these facts, the actions of the defendant and his wife prior to and on the day and

evening of the fire were shown, thus disclosing conduct on their part which, when considered in connection with the circumstance of the burning of the house, was, to say the least of it, of a very suspicious character.

But conceding, for the purpose only of the decision of the point now before us, that the testimony so heard was entirely incompetent and in any event entirely insufficient to justify the indictment, yet, under the law, an appellate court cannot review that question to any purpose. It is true that section 919 of the Penal Code provides that the grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence. It is also true that section 921 of said Code declares that "the grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction," which, no doubt, also means that, unless the evidence is such as is thus described, an indictment ought not to be returned, although it has been held that as far as said section was intended to go was to operate "only as a matter of advice to the jury." (*State v. Boyd*, 2 Hill (S. C.), 288, [27 Am. Dec. 376]; *In re Kennedy*, 144 Cal. 634, [103 Am. St. Rep. 117, 1 Ann. Cas. 840, 67 L. R. A. 406, 78 Pac. 34].) It has, however, repeatedly been held in this state that there is no method provided for revising the action of a grand jury on the ground that there was not sufficient evidence to support it. (*In re Kennedy*, 144 Cal. 636, [103 Am. St. Rep. 117, 1 Ann. Cas. 840, 67 L. R. A. 406, 78 Pac. 34]), and cases therein cited; *Brobeck v. Superior Court*, 152 Cal. 289, [92 Pac. 646]. See, also, Bishop on Criminal Procedure, sec. 872, and *United States v. Reed*, 2 Blatchf. 437, [Fed. Cas. No. 16,134].) In the Kennedy case it is said: "An indictment is the record of the action of a judicial body, and such action is final when there is no appeal therefrom and no other method provided for revising it; and there is no method for revising it on the ground that there was not sufficient evidence to support it" (citing Bishop on Criminal Procedure, sec. 872; *State v. Boyd*, 2 Hill (S. C.), 288, [27 Am. Dec. 376]; *Smith v. State*, 61 Miss. 759; *Hight v. United States*, Morris (Iowa), 407, [43 Am. Dec. 111]; *United States v. Reed*, 2 Blatchf. 437, [Fed. Cas. No. 16,134]; *Hammond v. State*, 74 Miss. 214, [21 South. 149]).

In all the cases just named, the question was reviewed on appeal, and in the Kennedy case, *supra*, our supreme court said that: "The statutes of the states where the decisions above referred to were made do not differ materially on the subject of grand juries . . . from those of this state."

2. Counsel for the defendant, in their briefs, make a general objection that a mass of evidence was admitted which involved irrelevant and hearsay testimony, all prejudicial to the substantial rights of the accused. The fact is, indeed, that the alleged errors of which the defendant thus seeks to avail himself here are not pointed out with that definiteness essential to make it entirely clear what particular rulings it is claimed the court erroneously made to the detriment of the accused. But we are able to gather from the briefs that it is the claim that all the testimony relating to the several transfers of the property, when those transactions were not carried on or discussed in the presence of the defendant, was hearsay and incompetent; that the testimony relative to the insurance, involving the statements and acts of Dodson, Mrs. Fealy, and the insurance agents and adjusters, made and done both before and after the fire, in the absence of the defendant, was likewise incompetent and prejudicial; that the testimony of the notary public, before whom the deed from Mrs. Fealy to Dodson was acknowledged, disclosing what was done and said by and between Dodson and Mrs. Fealy constituted hearsay statements, the defendant not having been present when that transaction took place; that certain witnesses were erroneously permitted to testify that certain furniture which was found to have been removed from the house before the fire they had seen in the house prior to the fire; that the testimony offered and received in impeachment of the defendant's general reputation in Napa County for truth, honesty, and integrity was improperly allowed and seriously damaging to the defendant. As before stated, the theory upon which the case was tried was that the defendant, his wife, his brother Tom, and Dodson had entered into a confederation or conspiracy to destroy the building by fire for the purpose of securing the insurance money. Necessarily, from the very nature of the case—that is, from the fact that, to support the charge and prove the defendant's connection with the alleged conspiracy, reliance upon circumstantial evidence was necessary—the proofs covered an

extensive and varied field of inquiry. The evidence in the case of a conspiracy, where the defendant's connection therewith it is necessary to prove, is wider than perhaps in any other case. Taken by themselves, the acts constituting a conspiracy, while perhaps more or less incriminatory, are seldom of an unequivocally guilty character, and can only be properly and justly estimated when connected with all the surrounding circumstances. And there is no rule of evidence better settled than that: "Where the guilt of a party depends upon the intent, purpose, or design with which an act is done, or upon his guilty knowledge thereof, collateral facts in which he bore a principal part may be examined into for the purpose of establishing such guilty intent, design, purpose, or knowledge. It is sufficient that such collateral facts have some connection with each other as a part of the same plan or induced by the same motive, and it is immaterial that they show the commission of other crimes." (8 Cyc. 684.)

In this case, the theory that there had been formed by and between the defendant, his wife and brother and Dodson a conspiracy to destroy the building by fire is an exceedingly plausible one. It, indeed, was supported by what appear to be very powerful circumstances; and, while it is no doubt true, as might reasonably be expected and, indeed, quite unavoidable in a case where, as in this, multitudinous as well as multifarious circumstances are required to be shown to prove the ultimate fact, some erroneous statements or testimony found their way here and there in the record, still careful examination and consideration of all the testimony has convinced us that, in the main, the testimony complained of was not only pertinent to the case but legally competent, and that the few errors which were committed were of little consequence, or bore upon matters which, in view of the strong circumstantial case legitimately made against the defendant, could have exerted no baleful influence in bringing about the result arrived at by the jury.

Replying, however, somewhat specifically, though briefly, to the objections urged here against some of the testimony, it may be observed that it was obviously not only proper, but, considering the hypothesis upon which the case was presented by the people (that the burning was the consequence of a conspiracy formed for that purpose), it was necessary to show that the property in reality belonged to Mrs. Fealy, and

that she had never in fact parted with title thereto before the fire, and the conveyance to Dodson, as he himself admitted, was not intended nor understood to be a *bona fide* transfer of the fee; that it was likewise proper and necessary to show that the insurance had been transferred to Dodson; that he obtained additional insurance on the furniture or building; that he, aided by the defendant and his wife, made out the inventory of losses to present to the insurance companies, and included therein furniture, silverware, pictures, and other household equipments which had, prior to the fire, been removed by the defendant and his wife from the house and stored and safely preserved elsewhere. It was proper to show that the insurance companies refused to pay the losses, when such payment had been applied for by Dodson and Mrs. Fealy, even though some of the conversations relating thereto were had when the defendant was not present. All these conversations and transactions were had before the consummation of the transaction for the execution of which the conspiracy or corrupt agreement was formed, *viz.*, fraudulently to obtain money from the insurance companies holding policies on the property. They therefore involved statements only of certain of the alleged conspirators relative to the conspiracy after its formation and before the consummation or abandonment of its object, thus rendering testimony thereof, whether the accused was or was not present when they occurred, admissible under the rule. (Code Civ. Proc., sec. 1870, subd. 6; 8 Cyc. 680, and cases cited in the footnotes; *People v. Irwin*, 77 Cal. 494, [20 Pac. 56].)

The proposition that the testimony of the general reputation of the defendant in the community in which he had resided for many years for truth, honesty, and integrity was erroneously allowed is to be met by reference to the provisions of section 2051 of the Code of Civil Procedure. That section declares that a witness may be impeached, among other ways, "by evidence that his general reputation for truth, honesty, or integrity is bad." The defendant took the witness-stand in his own behalf, and gave testimony the purpose and the tendency of which were to exculpate him from the charge or absolve him entirely from any connection with the commission of the alleged crime. It has from a very early date and time and again been held that, when a defendant in a criminal case testifies for himself and gives testimony tend-

ing to exonerate him from the crime for which he is on trial, he for the time being removes from himself the character of a defendant and takes on that of a witness, and that the moment he so submits himself as a witness, "his character as such witness, for truth, honesty, and integrity is involved," and he becomes subject to the same rules for testing his credibility before the jury, by impeachment, as is any other witness. (*People v. Beck*, 58 Cal. 212; *People v. Bentley*, 77 Cal. 7, [11 Am. St. Rep. 225, 18 Pac. 799]; *People v. Gallagher*, 100 Cal. 466, [35 Pac. 80]; *People v. Hickman*, 113 Cal. 80, 86, 87, [45 Pac. 175]; *People v. Mayes*, 113 Cal. 618, 624, [45 Pac. 860].) It follows that it was proper in this case for the people, by way of rebuttal, to show that the defendant's general reputation for the traits mentioned was bad.

The defendant complains of the following instruction which was given by the court: "The defendant has offered himself as a witness in this case, and given testimony in his own behalf, which is his constitutional right, and you should not reject his testimony solely because he stands accused of a crime. It is your duty to fairly and impartially consider his testimony under the rules of evidence given you, and *if it produces conviction in your minds, you should act upon it, otherwise you may reject it.*"

The criticism is aimed at the portion of the instruction in italics, and it is said that by that language the court in effect instructed the jury that it was incumbent upon the defendant to establish his innocence beyond a reasonable doubt.

It may perhaps be well enough in criminal cases to remind the jury of their duty of considering and weighing the testimony of a defendant as they are required to consider the testimony of any other witness in the case, and regardless of the fact that the defendant stands accused of the crime which is under investigation; but the other parts of the instruction it is unnecessary under any view to submit to a jury, and should never be given, lest they may produce the impression that the judge himself questions the veracity of the accused. The portions of the instruction referred to embrace, as a matter of fact, mere commonplaces, or propositions with which the most ordinary understanding should be familiar. The truth is that the criticised language of the instruction does not accurately state the proposition which it purports to express,

for it is the duty of the jury to *act* upon the defendant's testimony in any event, either by accepting it as truthful or rejecting it as unworthy of belief, or by giving it some weight or no weight. What was really intended to be expressed by the language referred to, however, was probably this: That, if the jury believed the defendant's story, he would be entitled to an acquittal, and if they did not believe it, they should, in reaching a conclusion upon the question of his guilt or innocence, reject it. If a jury of citizens could be found in this enlightened day and generation who would not know, without being told, that it would be their duty to reject testimony which they did not believe, or, if they did believe it, to give it due weight and so let it perform its proper function in the determination of the final result, it would indeed be necessary to declare that there had been a noticeable as well as lamentable decline in the efficacy of the jury system as an instrumentality for the administration of public justice. If, however, it could justly be said that the language of the instruction is misleading, or, as we believe to be true, does not accurately expound the rule so sought to be explained, and even if to some extent it may be obnoxious to the other objections made against it, yet we cannot say that the defendant suffered any prejudice by the submission of it to the jury; or, considering all the evidence, that a miscarriage of justice followed from it. (Const., art. VI, sec. 4½.) The record upon the whole shows that the accused was given a fair trial, and the evidence of his guilt appears to be clear and convincing, and we cannot persuade ourselves that the instruction, even though, as is further said of it, it singles out the defendant from among the many witnesses testifying, and so refers solely to his testimony, could have affected the verdict. (*People v. Loomis*, 170 Cal. 347, 351, [149 Pac. 581]; *People v. Weston*, 169 Cal. 393, 396, [146 Pac. 871]; *People v. Stephens*, 29 Cal. App. 621, [157 Pac. 570, 572]; *People v. Burns*, 27 Cal. App. 237, [149 Pac. 605].)

5. The defendant requested an instruction stating that the law recognizes two classes of evidence, upon either of which, if legally sufficient in the degree of its persuasiveness in probative force, a jury may lawfully find an accused guilty of crime, to wit, direct and circumstantial evidence. In allowing and giving the instruction the court added thereto the following language: "Such circumstantial evidence may con-

sist of incriminating admissions made by one accused of crime, plans laid for the commission of the crime by the accused, such as putting himself in a position to commit it; in short, any act, declaration, or circumstance admitted in evidence tending to connect the accused with the commission of the crime."

It is claimed by the defendant that, in thus modifying the instruction and as so modified reading it to the jury, the court instructed upon matters of fact. We do not so view the instruction as given. It is general in form, and makes no special reference to the case in hand, is abstractly correct in stating the nature and elements constituting circumstantial evidence, and, indeed, like the instruction first above considered, involves only the statement of propositions coming within the range of common knowledge, and which should be obvious to every person possessing common intelligence.

We have found no prejudicial error in the record, and the judgment and the order appealed from are affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 5, 1917.

[Civ. No. 2029. First Appellate District.—May 10, 1917.]

FRANK H. JOHNSON, Respondent, v. W. F. CORDES, Appellant.

VENDOR AND PURCHASER—DAMAGES FOR BREACH OF CONTRACT—MATERIAL ALTERATIONS AFTER EXECUTION—SUFFICIENCY OF EVIDENCE.—In an action to recover damages for the breach of an alleged contract for the sale of real estate, a finding that the defendant entered into the alleged contract, which was attached as an exhibit to the complaint, is unsupported, where it is shown that it was materially altered after its execution, without the defendant's knowledge or consent, by the insertion therein of the purchase price of the property in both letters and figures and the addition of a clause relating to the prorating of the taxes and insurance on the property.

Id.—RIGHT TO ATTACK DUE EXECUTION OF CONTRACT—AMENDMENT OF ANSWER AT TRIAL—DISCRETION.—In such an action the failure of the defendant to attack the integrity or due execution of the contract in his original answer did not deprive him of the right to make such attack at the trial by amendment to his answer, as the matter of such amendment rested in the sound discretion of the trial court.

Id.—ALTERATION OF INSTRUMENT—TRIAL OF ISSUE—PROCEDURE.—The time when proofs shall be presented upon an issue as to the validity or admissibility of a writing claimed to have been altered after its execution is a mere matter of procedure during the trial within the regulation of the trial court.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and an order denying a new trial. Adolphus E. Graupner, Judge.

The facts are stated in the opinion of the court.

C. W. Durbrow, and Frank B. Austin, for Appellant.

Grant H. Smith, for Respondent.

RICHARDS, J.—This is an appeal from a judgment in favor of plaintiff for the sum of two thousand dollars damages, and costs, in an action arising out of a contract for the sale of real estate.

The facts of the case are these: The plaintiff, Frank H. Johnson, had listed a certain piece of real estate known as "Highlands," situated in Marin County, California, with A. J. Rich & Co., a firm of real estate brokers in San Francisco, for sale. On April 6, 1912, the defendant, W. F. Cordes, met one A. C. Blumenthal, an employee of A. J. Rich & Co., at the real estate office of another broker at San Rafael, and there discussed the subject of the sale and purchase of the property. After certain representations had been made by Blumenthal, two printed blank forms of A. J. Rich & Co.'s combined receipt and agreement for the purchase of real estate were produced by the latter, which after being filled out to a certain—or rather uncertain—extent by him, were both signed by Blumenthal, acting for A. J. Rich & Co. One of these was then subscribed by the defendant Cordes and retained by Blumenthal. The other was not signed by Cordes but was delivered to him apparently as his receipt for the sum of \$250

then paid by him on account of said purchase, and also as his memorandum of the agreement thus made. Within the course of a month after the execution of these papers the defendant Cordes repudiated his promised purchase of the premises and refused to proceed further with the matter, asserting that he had signed the agreement upon the understanding that the property could be sold at an advance, and that he had no use for the property. After some efforts to induce the defendant to take the property at the agreed figure of seventeen thousand dollars, the plaintiff sold the premises in January, 1913, for the sum of fifteen thousand dollars, and then instituted this action to recover in the form of damages the sum of two thousand dollars for the defendant's alleged breach of his contract.

To his complaint in said action the plaintiff attached as an exhibit the alleged contract upon which his cause of action was founded. In his answer as at first filed the defendant did not dispute the form or due execution of said contract as set forth in said exhibit, but relied upon certain alleged false representations on the part of Blumenthal to defeat the plaintiff's claim. When the cause came on for trial and the original contract itself was produced, and for the first time after the date of its execution exhibited to the defendant, he at once asserted that it had been changed after its execution by the making of certain erasures, interlineations, and additions which went to the essence of the contract itself and vitally affected its validity; and in support of this assertion the defendant asked and was granted leave of court to so amend his answer as to set up these matters by way of defense. This being done, the plaintiff offered his alleged contract in evidence, and the court admitted it over the objection of the defendant, which, while quite general in its terms, was evidently made in the light of and with direct reference to the subject matter of the amendment to his answer. After the admission of the paper in evidence the trial court heard the evidence offered by both parties touching the alleged alteration of the contract after its execution. The cause having been submitted, the court made its finding to the effect that on April 6, 1912, the defendant had entered into the agreement in writing as set forth in the plaintiff's complaint, but made no direct finding upon the issue as to the alleged alteration of the writing after its execution. The other findings of the court were

in plaintiff's favor, and judgment was thereon entered against the defendant for the sum of two thousand dollars, from which he now prosecutes this appeal.

The first contention of the appellant is that the finding of the trial court that the defendant entered into the written agreement set forth in the plaintiff's complaint is unsupported by the evidence in the case. From a careful reading of the record before us as well as from an inspection of the two original documents claimed by the plaintiff to have been made contemporaneously on April 16, 1916, we are constrained to uphold the appellant's contention in this regard. There were but two witnesses to the facts and circumstances attending the execution of the documents in question—the defendant and the witness Blumenthal. The defendant testified positively and unequivocally that the two papers were in substantially the same identical form at the time of their execution, and that the erasures made in the copy retained by Blumenthal, and the insertion therein of the purchase price of the property in both letters and figures, and also the addition of the clause relating to the prorating of the taxes and insurance upon the property, were made at some time after his signing said paper and without his knowledge or consent. On the other hand, the witness Blumenthal is, even in his direct examination upon the subject, most equivocal as to when the evident erasures and interlineations were made; while upon his cross-examination and in response to a direct and pointed inquiry he expressly stated that he could not say whether it was before or after the execution of the contract that these changes were made. The original paper produced before us upon the argument on this appeal supplies to our minds its own irresistible proof that the erasures and interlineations in this document were made at some time after the original writing was executed. What these erasures and insertions were appears by comparison with the substantial copy of the agreement delivered to the defendant; but chief among these in the point of vital importance to the validity of the original writing itself as an agreement for the sale of real estate was the insertion, in both letters and figures, of the purchase price of the property to be transferred. It has been held by this court that one of the essentials to an enforceable contract to sell real estate is that the writing shall expressly set forth the purchase price to be paid for the property. (*Baume v. Morse*, 13 Cal. App. 456,

[110 Pac. 350].) It is also needless to say that the addition to the original record of a clause to the effect that the taxes upon the property should be prorated would also constitute a material alteration of its terms.

The respondent, however, insists that the appellant is not entitled to take advantage of these alterations in his agreement for two reasons: First, that in his original answer he did not attack the integrity or due execution of the writing, a copy of which was attached to the complaint served upon him, and that his subsequent objection thereto made for the first time more than a year and a half after he had been served with a copy of such paper, in the form of his amended answer, comes too late; and, second, that the defendant's objection and proofs should have been specifically made and tendered at the time the instrument was offered in evidence, and not at a later time in the trial after the court had received the instrument in evidence.

Neither of these objections is, in our opinion, well taken. The matter of permitting the defendant to amend his pleading so as to set up the defense referred to rested in the sound discretion of the trial judge, which, being exercised in favor of permitting the proposed amendment, is not the subject of review upon this appeal. When such amendment was made it related back to the filing of the defendant's original answer, and entitled him to all the advantages of its defense which he would have had if the amended matter had been a part of his original pleading.

As to the respondents's other insistence, that the defendant should have specifically made and stood upon his objection to the admissibility of the changed document in evidence, and then and prior to its admission proffered his proofs as to its alteration, there are two answers: The first of which is that the defendant's objection to the admissibility of this document made immediately after the amendment to his answer and with direct reference to it, was, in our opinion, sufficiently specific; and, second, that the time when the proofs shall be presented upon an issue as to the validity or admissibility of a writing claimed to have been altered after its execution is a mere matter of procedure during the trial within the regulation of the trial court. The order in which the evidence is presented is not ordinarily reviewable upon appeal where the

evidence itself is responsive to an issue and is admitted without objection.

The foregoing views with respect to the invalidity of the original contract for the sale of the real estate in question render unnecessary a discussion of the appellant's further contention as to the effect of the alleged misrepresentations of Blumenthal as a sufficient ground for the avoidance of the defendant's agreement for the purchase of said property, for these alleged misrepresentations are immaterial if the agreement itself was not of binding effect.

Judgment reversed.

Lennon, P. J., and Kerrigan, J., concurred.

[Crim. No. 668. First Appellate District.—May 10, 1917.]

THE PEOPLE, Respondent, v. HENRY J. STANLEY,
Appellant.

CRIMINAL LAW—OMISSION TO PROVIDE FOR ILLEGITIMATE CHILD—STATUTE OF LIMITATIONS.—A prosecution under section 270 of the Penal Code, which went into effect on August 8, 1915, for omitting to provide for an illegitimate child, is not barred by the one-year limitation provided by section 801 of such code, although the omission began at the child's birth, which was more than one year before the filing of the information charging the offense as having been committed after the statute went into effect, and within the statutory period of the year.

Id.—CONSTRUCTION OF STATUTE—CONTINUING OFFENSE.—Under section 270 of the Penal Code, the offense of omitting to provide for an illegitimate child is in the nature of a continuing offense, and public policy requires such a construction of its terms as to render each and every willful omission without legal excuse to so provide a fresh offense, and so construed, the statute is no more *ex post facto* in its intendment and effect than would any other statute be which made penal acts and conduct which were not so prior to its enactment.

Id.—PROSECUTION OF FATHER OF ILLEGITIMATE CHILD—PREVIOUS ESTABLISHMENT OF DUTY TO SUPPORT—NONESSENTIAL REQUIREMENT.—Under section 270 of the Penal Code, the alleged father of an illegitimate child may be prosecuted for failure to support it with-

out having his duty so to do established and directed in a civil action under section 196a of the Civil Code.

ID.—PUBLIC TRIAL—WAIVER.—A defendant in a criminal action cannot claim that he was denied the right to a public trial where, at his own request, spectators were excluded and he concurred in the order made.

ID.—ORDER OF EXCLUSION—RIGHT TO PUBLIC TRIAL NOT VIOLATED.—The right to a public trial is not violated when the order of the court excluding the public is sufficiently broad and flexible as to admit the officers of the court, the witnesses for the respective parties, the members of the bar, and all others who have a legitimate interest in the case, including relatives or friends of the defendant and of the complaining witness, and only excluding those who have no interest in the case.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

Edwin V. McKenzie, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

RICHARDS, J.—This is an appeal from a judgment of conviction of the defendant upon the charge of omitting to provide for an illegitimate child, and from an order denying his motion for a new trial.

The first contention urged by the appellant is that the offense of which he was convicted is barred by the provision of section 801 of the Penal Code. The argument in support of this contention is based upon the facts that the statute under which this prosecution was had went into effect on August 8, 1915; that the child was born March 25, 1915, and that the defendant's omission to provide for it began at the date of its birth; that the information was filed herein on August 7, 1916; that the statutory limitation upon misdemeanors of this character is one year. From these facts the appellant argues that he is being prosecuted for an offense committed more than one year before the information was filed; and in connection with this argument, and upon the same state of facts, the appellant urges that the statute itself is an *ex post*

facto law, at least in its application to his case, in that it has undertaken to make and punish as an offense that which was not a punishable offense at the time of its commission.

Neither of these contentions is well taken. As to both of them it appears that the information charged the offense as having been committed on October 15, 1915, and that the information was filed on August 16, 1916, or within the statutory period of the year, and that the proofs in the case support the date fixed for the inception of the defendant's offense. The statute under which he was charged and convicted became effective on August 8, 1915. It made an offense that which was not so in a legal sense before it went into effect. It did not purport to punish acts of omission prior to the date upon which it took effect, and the statute of limitations could not therefore have commenced to run before that date, nor could the defendant have been guilty of acts of omission which he could urge as constituting the inception of the crime which did not, in legal effect, exist so as to entitle him to the benefit of the statutory limitation. Besides, we are disposed to agree with the suggestion of the trial court in its charge to the jury that the offense of which the defendant stands convicted is in the nature of a continuing offense, and that public policy would require such a construction of the terms of section 270 of the Penal Code as to render each and every willful omission without legal excuse on the part of the parent to furnish necessary food, clothing, shelter, or medical attendance to his or her child a fresh offense. So construed this statute is no more *ex post facto* or retroactive in its intendment and effect than would any other statute be which made penal acts and conduct which were not so prior to its enactment.

The next contention of the appellant is that there can be no prosecution of the alleged father of an illegitimate child for his failure to support it until his duty so to do has been established and directed in a civil action under section 196a of the Civil Code. It is sufficient to say in response to this contention that the cases cited by the appellant in seeming support of it were decided prior to the amendment of section 270 of the Penal Code, and were among the causes which moved the legislature to so amend said section of the Penal Code as to make its provisions expressly applicable to the parents of illegitimate children; and it is further quite clear that the provisions of the Civil Code having reference to the custody

and support of legitimate children can have no application to illegitimates. The fact that there may be difficulties in some instances in establishing paternity in the latter class of cases would not of itself be a sufficient reason for importing into the statute the requirement of an antecedent civil action not contemplated by its terms. We find no merit, therefore, in this contention on the part of the appellant.

The appellant's next contention is that the venue of this prosecution was not properly laid or proven since, as he claims, the evidence shows that the mother of the child did not reside in the city and county of San Francisco at the time of the defendant's alleged omission to provide necessaries for it. But in this regard the evidence is conflicting, and for that reason the judgment of the trial court will not be disturbed.

The next contention is that he was denied his right to a public trial. The following are the facts occurring during the course of the trial upon which this contention is predicated: Upon the opening day of the trial, September 20, 1916, after the information had been read to the jury, counsel for the defendant, addressing the judge of the trial court, said: "Your honor, the defense asks that the spectators be excluded," to which the court replied: "Very well. I act on that suggestion in all cases of this character. The request has been made by the parties hereto, especially by the defendant, that in view of the nature of the proceedings to be had here we have a closed session. Therefore, all persons now here except such as are in some way related to this case will please retire." The record does not disclose what effect was given to this order, or to what extent, if any, it was enforced or obeyed. The trial of the cause proceeded for several days, and in fact was drawing toward its close when, on September 27, 1916, while the witnesses for the defense were being called to testify, counsel for the defendant said: "Now we ask at this time that the courtroom be cleared, your honor, under the former rule," to which the court replied:

"Well, I will clear it of all except any persons who have any legitimate interest here. I am very much in sympathy with counsel's motion in so far as it has to do with a great many people who are attracted to the courtroom when cases of this character are on trial, not because they have any sort or kind of legitimate interest in the proceedings, not that they are concerned at all with the administration of public justice,

but apparently simply and solely to gratify some sort of prurient curiosity or feeling or desire of some sort that finds great satisfaction in listening to testimony of the kind that is ordinarily adduced upon these hearings. If, upon the other hand, there are any persons here who are brought here because of any legitimate interest of any sort or kind in the case, or in any of those concerned with it, they may remain. For instance, if the defendant has here any personal friends or relatives, they may remain. If the complaining witness has any relatives or friends now here, they may remain. But the rest of the people here, who have no interest in this case, will kindly retire.

"Mr. McKenzie (Counsel for the Defendant): Your honor, if that is going to include the friends of this complaining witness we assert our right to a public trial.

"The Court: No, you having already waived your right to a public trial, that waiver will stand.

"Mr. McKenzie: We meant the whole courtroom with the exception of the officers, and that is the motion we make.

"The Court: All right. I will stand on that.

"Mr. McKenzie: We ask that we have a public trial and we refuse to waive the right.

"The Court: The trial will proceed as already ordered."

The record nowhere discloses to what extent the second order of the court was obeyed or enforced, nor in fact whether any portion of the public were excluded from the courtroom during the remainder of the trial of the cause, but if we are to assume for the purposes of this contention that both of the above orders of the trial court were obeyed, we are still of the opinion that as to the first order the defendant must be held to have waived his right to a public trial by his own request for the exclusion of spectators, and by his concurrence in the order which the trial court then made, and that as to the second order of the court, made also upon the defendant's request, that the courtroom be cleared, we think the form of the order was such as not to invade the right of the defendant to a public trial in case he had not already waived that right; and that even though the trial court had made its second order on its own initiative it would not have amounted to a denial of the right of the defendant to a public trial.

The provision of the constitution with respect to the right of accused persons to a public trial must be construed in a reasonable sense in view of the object to be subserved thereby, and is not to be interpreted as intended that the trial of criminal cases shall be held in places so large, or so open, as that the entire body of the public of a city or region may attend it if they so desire, or that every idle or morbidly curious person may have at all times freedom of admission to the place of trial. When the order of the court is sufficiently broad and flexible as to admit the officers of the court, the witnesses for the respective parties, the members of the bar, and also, as in this case, all others who have a legitimate interest of any sort or kind in the case, including the personal relatives or friends of the defendant and of the complaining witness, and only expressly excluding those "who have no interest in the case," it cannot be said that the trial has not been a public trial, or that the order was not one which was clearly within the sound discretion of the trial court to make. (*Reagan v. United States*, 202 Fed. 488, [44 L. R. A. (N. S.) 583, 120 C. C. A. 627], and cases cited.) The authorities cited by appellant are not out of harmony with the views above expressed.

The appellant further contends that the trial court committed a prejudicial error in permitting the prosecuting witness to take her child (of whom it was asserted the defendant was the father) with her to the witness-stand and hold it in her lap while testifying. The record shows that the child was an infant, and ill, and was asleep while being so held by its mother, and further shows that the trial court not only refused to permit the child to be admitted in evidence for the purpose of showing an asserted similarity of features to those of its putative father, but even went beyond this refusal in an emphatic instruction given at the time to the jury not to be influenced by the presence or position of the child. In addition to this the record shows that the child had been in the courtroom with its mother prior to her taking the witness-stand, and subject to the same or even a closer observation on the part of the jury than was the case when the mother took the sleeping child with her to the stand. Under such conditions we fail to see either that the trial court erred, or that the defendant was in any way prejudiced by the episode of which he complains.

In addition to his foregoing contentions the defendant urges a number of objections to the instructions given or refused by the trial court. We have examined each of these in the light of the general body of instructions given by the court, and are convinced that upon the whole no prejudicial error was committed in the giving or refusing to give any of the instructions to which the appellant now objects.

We are able to discover no substantial error in the record before us.

Judgment and order affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 9, 1917, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 9, 1917.

[Civ. No. 1861. Second Appellate District.—May 10, 1917.]

STUART H. INGRAM, Respondent, v. JOHN T. SLAYTON, Appellant.

FORCIBLE ENTRY—FINDING—INSUFFICIENCY OF EVIDENCE.—In an action for forcible entry to recover the possession of a tract of land, a finding of the making of such an entry as is defined in section 1159 of the Code of Civil Procedure is not sustained, in the absence of any evidence of violence, offer of violence, or show of superior force attendant upon the entry of the defendant upon the land.

ID.—TITLE OF DEFENDANT—WHEN IMMATERIAL.—Where, in such an action it is shown that at the time of the defendant's entry the plaintiff was in the actual peaceable possession of the land, the question of the defendant's title is not material to recovery, for one who enters where actual possession has been acquired by another, may do so only in a peaceable way or under authority of a judgment of court, excepting where he enters under some form of permission given by the occupant.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

Childers & Bruce, for Appellant.

Herbert L. Iasigi, James E. Shelton, and Parker & Collier, for Respondent.

JAMES, J.—Plaintiff brought this action to recover possession of a certain tract of land in the county of Imperial, alleging that defendant had forcibly intruded upon his peaceable possession and “by force and by menacing the employees of plaintiff with a show of superior force entered thereon and in a forcible manner ejected plaintiff from the said land. . . .” The court entered judgment in favor of the plaintiff, from which this appeal is taken.

The main contention put forth by the appellant is that there is no evidence to sustain the finding of the court as to a forcible entry having been made, as such entry is defined in section 1159 of the Code of Civil Procedure. With this contention we must agree. The statement of the testimony heard is exceedingly meager; but in view of the fact that it was settled as correct by the trial judge, we must assume that it shows all the material evidence received in support of the issue made by the complaint. (*Richardson v. City of Eureka*, 96 Cal. 443, [31 Pac. 458].) Counsel for respondent, outside of the record, suggest that the statement was prepared wholly by the appellant, and that it was served and offered for settlement just prior to an earthquake having occurred in Imperial County, and that presumably for that cause the counsel resident in that county, being other than the counsel who appear here, neglected to have the record show a complete statement of the testimony. Respondent is not entitled to have any consideration given to that suggestion. The bill of exceptions presents in abstract form the testimony of the plaintiff and the defendant. The plaintiff testified that he had been in possession of the tract of land, which was raw and brush-covered before he started to work upon it, since the 30th of September, 1912; that he had had several teams at work on the land, off and on, up to the 22d of December, 1913, and that some of the land had been leveled and cleared; that he had an employee on the land on the 22d of December, 1913, but that he (the plaintiff) was at that time in the state of

Nevada; that when he returned—the time is not stated—he found the defendant on the land with between seven and eleven teams which were at work. He testified that he had not fenced the land nor watered it, nor cropped it; that when he first went upon the ground he put a stake at each corner, with a notice stating that he was making a claim to the property, and that when he put up these notices he found other notices, partially obliterated, already posted. Defendant testified that he had known the land since October, 1906, and on the 24th of December, 1909, he did some scraper work upon it and put up notices at each corner stating that he was the successful contestant and had acquired a thirty days' prior right of entry to the land; that he plowed a furrow around the entire tract at that time in order to establish possession and show the public what his claim was; that he had never abandoned the land; that the first time he knew that plaintiff was on the land was in the latter part of October, 1912, and that in November, 1912, he had informed the plaintiff that he (the defendant) had a prior right of entry, won by a successful contest, and that he would assert his right when the land was restored to entry; to which the plaintiff had replied that he would follow the advice of his attorneys, and that he knew that the land was claimed by the defendant, but thought that he had abandoned it. Defendant further testified that in December he went upon the land and found a man by the name of Jones there. He then testified as follows: "He [Jones] was not doing anything when I went there, but he came out where I was working and asked if I had the consent of Ingram to work there. He then asked me to tell him to get off the land and not to work there. He said Mr. Ingram owed him and he wanted to get his pay and get away. He said that he would tell Mr. Ingram that I just gave him hell. I told him not to tell Mr. Ingram anything of the kind, as I did not want him to carry any such news as that from me. I did not make any threats or exercise any force at all against Mr. Jones whatever. I asked Mr. Jones to eat dinner with us and he did not show any evidence of being afraid of me." Defendant offered to prove by an exemplified copy of a record of the United States land office that the Secretary of the Interior, upon a contest between the defendant and a third party, had rendered a decision stating that the land would be restored to entry, and that the defendant would be given

thirty days after notice of such restoration during which time he would have a preference right to make entry on the land. Objection was made to this testimony and the offer was refused. It was not shown that the land had ever been restored to entry. It thus appears that there was no proof of any violence, offer of violence, or show of superior force attendant upon the entry of the defendant upon the land. The testimony shows that the plaintiff's possession was more than a scrambling possession; in fact, that he at the time of the defendant's entry had actual peaceable possession of the ground. However, the plaintiff could not succeed in the action unless he established the facts alleged. The proof was wanting to show any circumstances such as those set forth in the complaint and relied upon by the plaintiff. As to the proof required in such a case, we cite, in addition to the section of the code noted, section 1172 of the Code of Civil Procedure. (*Castro v. Tewksbury*, 69 Cal. 562, [11 Pac. 339].)

The additional point is made that the defendant was entitled to have received the documentary evidence offered showing the action of the Land Department taken with respect to the contest formerly decided. He says that he was entitled to make this proof to show the nature of his possession and to show a color of right. From the evidence as stated, it is clear that at the time of the entry by the defendant the plaintiff was in actual possession of the land, and no showing of constructive possession could avail the defendant as against the plaintiff on that issue. It is generally held under such facts that the question of the entryman's title is not material to a recovery by his adversary, for one who enters where actual possession has been acquired by another, may do so only in a peaceable way or under authority of a judgment of court, excepting, of course, where he enters under some form of permission given him by the occupant. (*Carteri v. Roberts*, 140 Cal. 164, [73 Pac. 818].) We think the last contention of appellant is without merit.

The judgment is reversed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

[Civ. No. 1822. Second Appellate District.—May 10, 1917.]

C. A. BUNNELL, Appellant, v. CHARLES R. THOMAS, Constable, etc., et al., Respondents.

APPEAL—DENIAL OF MOTION FOR SUBSTITUTED FINDINGS—NONAPPEALABLE ORDER.—An appeal from an order denying a motion to substitute other findings of fact for those signed by the court cannot be sustained, as the court has no authority to change its findings of fact after the entry of judgment.

1d.—CLAIM AND DELIVERY—OWNERSHIP AND RIGHT OF POSSESSION—ASSIGNMENT OF CAUSE OF ACTION AFTER SUBMISSION OF CASE—ERRONEOUS JUDGMENT.—Where, in an action against a constable and sureties on his official bond to recover the possession of an automobile taken under a writ of attachment, it is made to appear upon the face of the record that when the complaint was filed, and until the time of trial and submission of the cause for decision, the plaintiff was the owner and entitled to the possession of the property, it is error to find that the plaintiff was not entitled to possession or damages, because of the fact that after such submission there was filed a document purporting to assign to other parties all property and sums of money arising from the cause of action. Under such circumstances, the court should have granted a motion for another and different judgment, and amended its conclusions of law and rendered another judgment accordingly.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a motion for substituted findings, and from an order refusing to vacate the judgment and enter a different judgment. John M. York, Judge.

The facts are stated in the opinion of the court.

Winslow P. Hyatt, and Stephen L. Sullivan, for Appellant.

M. A. Fleming, C. W. Hall, A. J. Mitchell, and W. R. Law, for Respondents.

CONREY, P. J.—The plaintiff appeals from the judgment and this appeal is presented on the judgment-roll. He also appeals from an order denying plaintiff's motion to substitute other findings of fact for the findings of fact signed by the court, and from an order denying plaintiff's motion to vacate

and set aside the judgment and enter another and different judgment. The appeals from these orders are presented upon "bills of exceptions" duly certified, which set forth the papers used on the hearings in the court below.

As the court would have no authority to change its findings of fact after the entry of judgment, the appeal from the order denying the motion for substituted findings of fact cannot be sustained.

By virtue of a writ of attachment issued out of a justice's court of Los Angeles Township in an action of one Wilson *v.* Karl Brehme and Mae E. Brehme, an automobile was attached as property of the defendants Brehme. The attachment was made by Charles R. Thomas, township constable, defendant in the present action, and this action is brought against Thomas and the sureties on his official bond by the plaintiff C. A. Bunnell as a third party claiming to be the owner of said automobile. This action is brought to recover possession of the automobile, or for the value thereof in case delivery cannot be had, together with damages for its detention and for costs. This action was tried on the fifteenth day of September, 1914, and the findings were filed on the twenty-fifth day of September, 1914. On the sixteenth day of September, 1914, there was filed with the papers in this action in the superior court a document purporting to have been signed and delivered by C. A. Bunnell, purporting to transfer to other parties "all property and sums of money arising from the cause of action" herein, and the judgment recovered herein. That instrument was not introduced as evidence at the trial of the case, and manifestly did not exist at the conclusion of the trial when the case was submitted for decision. Nevertheless, the court annexed said purported assignment to the findings as an exhibit, and the judgment was in part based thereon. The findings of fact, after reciting the fact of the trial, and that evidence oral and documentary had been introduced by the respective parties, state that "the court having read and seen on file a purported assignment of this cause of action, and all rights thereto, and said purported assignment of said cause of action, and said bill of sale being made by the plaintiff herein to strangers to this suit, a copy of which assignment and bill of sale is hereto attached and marked Exhibit 'A,' the court now renders its decision and finds the following facts." The findings are that the plaintiff has no interest in

and is not the owner and is not entitled to the possession of the described property, "but was such owner from May 4, 1914, until September 15, 1914, when he parted with his title thereto by such Exhibit A"; that the defendant as constable did on the fifth day of May, 1914, without plaintiff's consent, wrongfully and unlawfully take and detain said property from the possession of the plaintiff, and has ever since and continuously retained the same under and by virtue of the described writ of attachment, as the property of the defendants in the action of *Wilson v. Brehme*; that on the fifth day of May, 1914, the defendants Brehme had no right, title, or interest in said automobile; that the automobile on the 5th of May, 1914, was of the value of five hundred dollars; that on the ninth day of May, 1914, the plaintiff demanded possession thereof from the defendant Thomas; that plaintiff is not damaged in any sum because of the alleged wrongful act of Thomas. The complaint alleged that the value of the use of the automobile during the period of its detention was ten dollars per day. The answer herein denied that the value of such use was any sum in excess of one dollar per day. As conclusions of law from its findings of fact the court found that the plaintiff was not entitled to possession of the automobile nor to damages, and judgment was entered accordingly.

It thus appears upon the face of the record that the court based its judgment upon supposed facts which were not in evidence at the trial, and that when the complaint was filed, and until the time of trial and submission of the case for decision, the plaintiff was the owner and entitled to possession of the property. Since the findings established plaintiff's ownership of the automobile when the case was submitted for decision on September 15, 1914, the court should have granted a motion for another and different judgment, and should have amended its conclusions of law and rendered another judgment accordingly, which judgment would have been for possession of the property, or its value in case delivery could not be had, and damages should have been awarded in the sum of one dollar per day during the period of detention thereof by the defendant Thomas. And the judgment itself as rendered and entered is clearly erroneous, because on the face of the findings it appears that the case was not decided upon the evidence, but upon a transaction which the court was not entitled to consider. It may be that, as claimed by appellant,

the evidence was sufficient to establish damages in the sum of more than one dollar per day as the value of the use of the automobile while thus detained. In the interest of justice, therefore, it would seem that the judgment should be reversed and the case remanded for a new trial, rather than that judgment should now be ordered as demanded by the motion for another and different judgment. For that reason the order denying the motion for another and different judgment is affirmed, and the judgment is reversed.

James, J., and Works, J., *pro tem.*, concurred.

[Crim. No. 376. Third Appellate District.—May 10, 1917.]

THE PEOPLE, Respondent, v. FLORI GRANDI, Appellant.

CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON WITH INTENT TO MURDER—EVIDENCE—INSUFFICIENTLY IDENTIFIED WEAPON—LACK OF PREJUDICE.—In a prosecution for the crime of assault with a deadly weapon with intent to commit murder, the defendant is not prejudiced by the admission in evidence of the pistol with which the prosecution claimed the assault was committed, even though the same was not sufficiently identified as the one which the defendant used, where it was admitted that he had a pistol at the time of the assault and that he discharged it.

ID.—DEADLY CHARACTER OF WEAPON—SUFFICIENCY OF EVIDENCE.—In such a prosecution the deadly character of the weapon used is sufficiently proven by evidence of its discharge which was accompanied with a hissing sound.

ID.—EVIDENCE—INTEREST OF WITNESS—PROCURING OF WRITTEN STATEMENT OF BAD REPUTATION OF ANOTHER WITNESS—ADMISSIBILITY.—In such a prosecution it is proper for the district attorney, for the purpose of showing that a witness for the defense had taken an unusual interest in the case in favor of the accused, to question the witness concerning the securing by him of a written statement of residents of the community declaring that the reputation of a witness for the state for truth was bad, but such statement is not admissible in evidence on motion of the defendant.

ID.—PRESUMPTION OF GOOD CHARACTER OF DEFENDANT—INSTRUCTION.—The refusal to instruct the jury to the effect that a person accused of crime is presumed to have a good character until the contrary is established by competent evidence, and that it is the duty of the

jury to give the defendant the benefit of such presumption, is not prejudicial, where the character of the accused for the traits involved in the charge upon which he was tried was not directly made an issue by the introduction of proof addressed thereto, and the jury was instructed that the defendant was to be presumed to be innocent until his guilt was confirmed by the evidence beyond all reasonable doubt.

APPEAL from a judgment of the Superior Court of Plumas County. J. O. Moncur, Judge.

The facts are stated in the opinion of the court.

H. B. Wolfe, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant was charged by information, filed in the superior court of Plumas County, with the crime of assault with a deadly weapon with intent to commit murder, and was convicted of assault with a deadly weapon. He appeals from the judgment.

The assault occurred on the twentieth day of July, 1916, between the hours of 4 and 5 o'clock P. M., in Clover Valley, a short distance from the town of Beckwith, in Plumas County. The party assaulted was one William Tognola. Both men are Italians, and were employed at a dairy owned by one Samuel Bonta. The prosecuting witness, Tognola, on the day before that upon which the assault was committed, mounted a horse for the purpose, as he stated, of going out into a field belonging to Bonta and driving therefrom some calves. Upon his return to the cabin, in which he and the defendant had been living, and which was situated near the dairy, the accused, with a large stick or club in his hand, approached Tognola and, addressing him, said: "You must be killed," or, "You will be killed." Becoming frightened at this demonstration upon the part of the defendant, Tognola dismounted from the horse and ran some distance away from the premises. On the following day, at the hour above named, while Tognola was engaged in milking, the defendant again approached him, this time with a pistol, and as Tognola, who saw him approaching with the weapon, started to run from him, fired two shots at the latter, neither of which struck

Tognola. This statement of the circumstances under which the assault was committed is taken from Tognola's testimony, which was corroborated by the testimony of one Paul Patonti, another employee of Bonta, and the only other person present at the time of the assault.

The motive for the assault is not clearly shown by the testimony, although Tognola testified that the defendant appeared to have become very angry with him on the day before because he (Tognola) had used the horse, which was the property of Bonta, for the above-stated purpose.

Tognola testified that he owned the weapon used by the defendant in making the assault; that he (Tognola) had left the pistol on a table in the cabin, and that the defendant had evidently gone into the cabin and taken it with him, perhaps for the special purpose of assaulting Tognola. The latter further testified that he heard the hissing noise of the bullets as they passed near him, and also said that, after the shooting, he slipped into the cabin through a window, procured some blankets and went out into the field, where he slept that night. The defendant, during the night, left the premises, and was later placed under arrest.

The defendant admitted on the witness-stand that he fired two shots from a "gun" at the time of the alleged assault, but positively declared that he did not shoot at Tognola.

The complaint on this appeal is of alleged errors in the action of the court disallowing certain testimony and declining to allow and read to the jury certain instructions requested by the defendant. Of these asserted errors, the first to which attention is directed is in the ruling whereby the pistol with which the prosecution claimed the defendant committed the assault was admitted in evidence. The ground of the objection was that the weapon was not sufficiently identified as the weapon used by the accused on the occasion of the shooting. But, assuming that the weapon was not sufficiently identified as the one with which the defendant did the shooting, the action of the court in admitting it in evidence was clearly without prejudice, since the defendant himself admitted that he had a pistol at the time of the assault and that he discharged it. In view of that admission, and of the fact that Tognola testified that the defendant fired the weapon at him, it obviously became a matter of little or no consequence whether the weapon actually used on the occasion of

the shooting was identified at the trial and introduced in evidence or not. The only purpose which could be subserved by proof, and the identification of the weapon, would be to corroborate the testimony of the witnesses that one was in the possession of the defendant at the time of the alleged assault, and that he used it as described by the witnesses for the people; and the admission by the accused that he did have such a weapon at the time referred to and discharged it, supplied every evidentiary purpose which the production of the weapon itself could possibly have accomplished. It follows that even the introduction in evidence of a pistol which was not used by the defendant on the occasion of the assault could not in any degree have affected the verdict.

It is next contended that there was entirely a failure to prove that the pistol by means of which the alleged assault was made was a deadly weapon. Confessedly, it is essential for the people, in a case where, as here, the claim is that the assault charged was committed by shooting a pistol or gun at the prosecuting witness, to show that the pistol or gun used as the means for committing the assault was loaded with powder and ball, or, in other words, that it was when so used a weapon which when employed as a means of assaulting another, is "likely to produce great bodily injury," and we think that there is evidence produced by the prosecution which tended sufficiently to prove that fact. The prosecuting witness and the witness, Patonti, as well as the defendant himself, testified that the weapon was fired or discharged, and Tognola declared that he heard the hissing sound which always accompanies a bullet as it whizzes through and against the air currents. These constituted circumstances from which the inference would naturally follow that the pistol was loaded.

There was no error in the action of the court in refusing to allow in evidence, on the motion of the defendant, a certain written statement, to which a number of the residents of the vicinity of Beckwith had subscribed, and in which it was declared that the reputation of Paul Patonti, a witness for the people, for truth, honesty, and integrity in the community in which he lived was bad. The offer of the statement was made during the examination of the witness, Rudolph Righetti, who testified for the defense. It appears that, after the defendant was charged with assaulting Tognola, and after it was known that Patonti would give testimony at

the trial against the defendant, Righetti, an intimate friend of the latter, prepared the statement referred to, and went about for the purpose of securing signatures thereto, and succeeded in inducing a number of persons to sign it. These facts were brought to light through the cross-examination by the district attorney of Righetti, and the statement was called for by that officer and produced by the witness, but it was not read to the jury by the district attorney. The object of the cross-examination, so far as it was based upon said written statement, was merely to show the interest of Righetti in the case and in behalf of his friend, the defendant. The statement, if received in evidence, would have shown, as before stated, that certain persons regarded the reputation of Patonti for truth, honesty, and integrity as bad, and, under the circumstances under which it was offered as proof, it would, if admitted, have been hearsay, pure and simple. The statement was undoubtedly offered upon the theory that it was allowable under the terms of section 1854 of the Code of Civil Procedure, but, as stated, while the district attorney called for and was given and examined the statement, he read no part of it to the jury, but only referred to it to show that Righetti had taken unusual interest in the case in favor of the accused.

The next assignment involves the action of the court in disallowing the following instruction, requested by the defendant: "You are instructed that you must find that defendant was armed with a loaded pistol, and by that is meant a pistol loaded in such manner that the discharge of it would produce death or great bodily injury upon William Tognola, and unless you find the pistol was so loaded you must find defendant not guilty."

The court defined a deadly weapon within the meaning of section 245 of the Penal Code, and then covered and clearly explained to the jury the proposition contained in the above-quoted instruction as follows: "You are instructed that in this case, defendant, Flori Grandi, is charged with the crime of assault with a deadly weapon with intent to commit murder, and you are instructed that before you can find defendant guilty of the crime as charged, you must be satisfied to a moral certainty and beyond all reasonable doubt that defendant, Grandi, was armed, with a pistol so loaded that it would inflict serious bodily injury or death upon William Tognola

under the circumstances as shown by the evidence in this case."

Thus, it will be observed, the proposition enunciated in the rejected instruction was clearly covered by the court's charge.

It is further objected that error was committed in the rejection of the following instruction, proposed by the defendant: "You are instructed that a person accused of a criminal offense is presumed to have a good character for the traits involved in this action for peace and quiet until the contrary is established by competent evidence, and you are further instructed that it is the duty of each and every of you as jurors to give the defendant the benefit of this presumption."

Generally, so far as the writer has observed, such an instruction is never proposed or given where the character of the accused for the traits involved in the charge upon which he is tried is not directly made an issue by the introduction of proof addressed thereto. It cannot be doubted, however, that the instruction correctly states the rule, and it would have been just as well to have given it, since the defendant requested that it be submitted to the jury; but it cannot be assumed, from the fact that the instruction or one bearing upon the subject to which it related was not given, that the jury considered the case upon the hypothesis that the defendant was not a man of good character for peace and quiet. It is, on the contrary, to be assumed, in view of the fact that the defendant's character was not directly assailed by the people, and that it was not made a direct issue by himself—that is, that there was no evidence whatever presented as to his character—that the jury considered the case as it was directly and actually made by the proofs, and upon the case as so made arrived at their verdict. But, at all events, under the circumstances, it seems to us that what is said in the rejected instruction was substantially and sufficiently declared in the instruction, which was given, that the defendant was to be presumed to be innocent until his guilt was confirmed by the evidence beyond all reasonable doubt.

We have now considered all the points urged for a reversal, and, having fully examined and considered the whole record, have found no legal reason for setting at naught the result arrived at below.

The judgment is accordingly affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1611. Third Appellate District.—May 10, 1917.]

BRINKLEY-DOUGLAS FRUIT COMPANY (a Corporation), Respondent, v. A. L. SILMAN, as Administrator, etc., et al., Appellants.

CORPORATION LAW—PLEADING—DENIAL OF INCORPORATION UPON INFORMATION AND BELIEF—ISSUE NOT RAISED.—In an action by a corporation the denial of the incorporation of the plaintiff upon information and belief is evasive and raises no issue, where the public record of incorporation was within reach of the defendant.

ID.—EVIDENCE—CORPORATE EXISTENCE.—Corporate existence may be proved by parol, and, when collaterally assailed, it is sufficient to prove a *de facto* existence.

ID.—SALE OF POTATOES—SEIZURE BY SHERIFF—OWNERSHIP BY BUYERS—SUFFICIENCY OF EVIDENCE.—In an action brought against a sheriff and the surety on his official bond for the conversion of a carload of potatoes, the ownership of the potatoes by the plaintiffs at the time of their seizure under a writ of attachment by the sheriff in an action against the plaintiffs' vendor, is sufficiently shown by proof of the loading of the same upon the car and the making out of a shipping receipt naming the plaintiffs as consignees, and the receipt of a large payment on account of the price, with assurance of the payment of the balance when the goods were ready to be shipped.

ID.—ATTACHMENT—THIRD-PARTY CLAIM—SUFFICIENCY OF DEMAND—WAIVER.—A sheriff is not permitted to question the sufficiency of the demand for the release of attached property made under section 689 of the Code of Civil Procedure, where he acts upon it and demands and receives an indemnifying bond from the claimant.

ID.—WRONGFUL SEIZURE AND SALE OF PROPERTY BY OFFICER—CONVERSION.—Conversion is the proper remedy against a sheriff who seizes and sells property of one person under process against another.

ID.—POSSESSION OF CONVERTED PROPERTY.—In an action of conversion against a sheriff, the plaintiff is entitled to recover where he proves ownership and right of possession together with its appropriation by the defendant, regardless of the fact that at the time of the conversion the property may have been in the possession of a third party.

ID.—JUDGMENT AGAINST ADMINISTRATOR—PAYMENT IN DUE COURSE OF ADMINISTRATION—CORRECTION ON APPEAL.—Error in a judgment against an administrator in not directing that it be paid in due course of administration is correctible on appeal.

APPEAL from a judgment of the Superior Court of Merced County, and from an order denying a new trial. E. N. Rector, Judge.

The facts are stated in the opinion of the court.

F. W. Henderson, and Hugh K. Landram, for Appellants.

Edward Bickmore, for Respondent.

BURNETT, J.—The action was originally brought by plaintiff against S. C. Cornell, as sheriff of Merced County, and the Title Company as surety on his official bond, for the conversion of 280 crates of sweet potatoes. After the action was commenced Cornell died and his administrator was substituted as defendant. The complaint is in the usual form for conversion. The answer denied the corporate existence of plaintiff, that plaintiff was ever the owner of the potatoes, and denied any conversion by Cornell. As a separate defense it was alleged that defendant Cornell, as sheriff, on February 26, 1912, duly levied on said potatoes a writ of attachment issued out of the justice court in an action wherein F. H. Duarte was defendant, and at the time of said levy Duarte was the owner of and in the possession of said potatoes, and that they were afterward sold and the proceeds regularly applied to the satisfaction of the judgments obtained in that action and in another action against the same defendant. It was also alleged that the plaintiff herein never served upon defendant, Cornell, any notice of its claim to said potatoes prior to said sale, and plaintiff never at any time served upon Cornell any claim in accordance with section 689 of the Code of Civil Procedure, and never claimed any of the proceeds of said sale.

The court found that plaintiff was a corporation as alleged; that plaintiff was, on February 26, 1912, the owner and entitled to the possession of the potatoes, which were of the value of \$476; that, on said day, S. C. Cornell, as sheriff, wrongfully converted the same to his own use; that the allegations in the answer in regard to the attachment and sale of the potatoes were true, but that it was not true that no claim of ownership was made by plaintiff, and, on the contrary, a demand and claim in writing was made upon S. C. Cornell prior to said sale. The court thereupon gave judg-

ment in favor of plaintiff and against defendants in the sum of \$476, from which judgment the appeal has been taken.

We proceed to notice all the points made by appellants in the order presented in the opening brief.

1. Appellants are entirely mistaken in the contention that there was no evidence to prove the corporate existence of plaintiff. There is the certificate of the Secretary of State of the filing in his office of the certified copy of the articles of incorporation of plaintiff, on the back of which the following indorsement by the county clerk of Merced County appears: "No. 2644. In the Superior Court of the County of Merced, State of California. The Brinkley-Douglas Fruit Company, plaintiff, v. S. C. Cornell, et al., defendants. Certificate of filing of Articles of Incorporation. Filed, August 3, 1912. P. J. Thornton, Clerk." As pointed out by respondent, the answer of defendants was filed February 13, 1913, and the denial of the incorporation of plaintiff was upon information and belief. If it be conceded that said certificate was not sufficient evidence of the incorporation, it is at least plain that, before the answer was filed, the attention of defendants was called to a public record of incorporation and we have an instance, therefore, for the application of the principle stated by the authorities as follows: "The rule is universal that matters of public record and within reach of the defendant cannot be denied upon the ground that defendant had no information or belief concerning them." The denial of the incorporation was therefore evasive and raised no issue.

But the corporate existence may be proved by parol (*People v. Morley*, 8 Cal. App. 372, [97 Pac. 84]; *Fresno Canal etc. Co. v. Warner*, 72 Cal. 379, [14 Pac. 37]), and, when collaterally assailed, it is sufficient to prove that the corporation has a *de facto* existence. (*Fresno Canal etc. Co. v. Warner*, *supra*.) There is abundant evidence in the record to satisfy the foregoing requirement. Indeed, appellants make no reference to the point in their closing brief and they were probably convinced of their error.

2. A more serious contention is the next one, that "plaintiff never owned the potatoes." As to this appellants say: "Stating the case most favorably to plaintiff, it would seem that about February 20, 1912, plaintiff wrote or wired to F. K. Duarte of Turlock, Merced County, a sweet potato

dealer, for a car of 274 crates of sweet potatoes at \$1.90 a crate; that at the same time plaintiff sent a check for \$246.60 and stated that it would have the First National Bank of Pueblo wire the People's State Bank of Turlock that F. K. Duarte's draft for \$1.00 per crate with bill of lading attached would be paid. That upon receipt of the order on February 26, 1912, Mary Duarte, daughter of F. K. Duarte, purchased the potatoes in question for her father from parties near Atwater, Merced County, and had them loaded on a Southern Pacific car. That they were loaded before 5 P. M. on the 26th and Mary Duarte made out a shipping receipt for the car which she signed for her father and the agent for the railroad company. The receipt named Brinkley & Douglas as consignees, Pueblo, Colo. Mary Duarte then took the shipping receipt and went to Turlock on the 5 P. M. train. That night F. K. Duarte wired plaintiff as follows: 'Have your bank wire People's State Bank at Turlock to advance me dollar per crate on car P. F. E. 3935 on presentation of bill of lading; there is two hundred and eighty crates in the car.' The next morning (February 27, 1912) Mary Duarte took the shipping receipt to the People's State Bank, signed her father's name to a draft on plaintiff for \$280, attached the shipping receipt to the draft and gave both to the bank and thereupon received the \$280. The draft was paid by plaintiff on March 5, 1912. S. C. Cornell, as sheriff, duly levied upon the car of sweet potatoes under a writ of attachment on February 26, 1912.

"It is evident from the foregoing statement that the property in the potatoes had not passed from Duarte or to plaintiff at the time of the levy of the writ of attachment. 'If the bill of lading with draft attached is sent to the seller's agent or bank for collection the property in the goods is reserved and does not pass to the buyer until payment.' (35 Cyc. 333. See, also, *Ramish v. Kirschbraun*, 107 Cal. 659, [40 Pac. 1045]; *Hilmer v. Hills*, 138 Cal. 134, [70 Pac. 1080].)"

We may notice briefly these authorities. As to the quotation from Cyc. it must, of course, be regarded, not only as an isolated sentence, but in connection with the context and the facts of the various cases cited in its support. As to this we may simply observe that the quoted sentence is followed by this statement: "A different intention may, however, be

indicated by the circumstances of the transaction and will of course control."

In the Ramish case, *supra*, the bill of lading was made to the vendors and by them indorsed to the vendee and it was agreed that it was to be delivered to the latter with the merchandise at Los Angeles "upon his payment there of the price of the eggs." It was in view of these circumstances that the court said: "There was no transfer of the title to the eggs before the bill of lading was received at the bank for delivery." It was also an important circumstance in that case that the bill of lading was not made out at Ottumwa, the shipping point, to the plaintiff or vendee but it was made to the defendants or vendors as consignees, "so that they could retain the property in the eggs in themselves until the payment of the draft by the plaintiff. Payment of the draft and transfer of the property in the eggs by delivery of the indorsed bill of lading, were intended to be, and were contemporaneous acts," as stated in the brief of respondents in that case.

In the Hilmer case, *supra*, the evidence is reviewed and it is concluded that it was clearly understood by the parties that the sale was to be for cash and the title was not to pass until the money was paid. Under such circumstances, necessarily, the title would vest contemporaneously with the payment of the money, since that was the expressed intention of the vendor and vendee. This would be so, notwithstanding possession may have been given to the vendee prior to the payment of the purchase price, and the vendee named as consignee in the bill of lading. As to this latter circumstance, *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 364, [18 Am. Rep. 299], is cited, in which it was held that the fact of the bill of lading being made out to the vendee as consignee does not have the effect to pass title in view of the evidence "clearly showing a contrary intention."

It must be said, however, that the case here is quite different. The evidence does not show clearly that it was the intention of the parties that the title should not pass until all the money was paid. The circumstances already detailed are quite consistent with the theory that the title passed when the potatoes were loaded on the car and the bill of lading taken out for plaintiff. It is not unreasonable to hold that Duarte considered the money as good as paid when he made

the consignment to plaintiff, and that he intended thereby to surrender and transfer all of his interest in and right of control over said potatoes. He had received a large payment, and an assurance that the balance would be ready for him at the bank when the goods were ready to be shipped. There is no reason to believe that he distrusted the good faith of respondent, or doubted that the money would be paid as agreed. He had had prior dealings with plaintiff, and it was quite natural for him to consider the sale consummated when he loaded the car for plaintiff. It is to be remembered that we are simply considering the question whether there was room for a rational conclusion that the title passed before the attachment was levied,—in other words, whether there was any substantial evidence to support the finding of the court to that effect. We feel no hesitation in answering the question in the affirmative and, in this connection, may refer to some authorities wherein the probative force of such circumstances is declared. In *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 364, [18 Am. Rep. 299], it is said: "Where goods are delivered by a vendor to a common carrier, consigned to the vendee, the question whether the title thereby passes from the vendor to the vendee, depends upon the intention of the vendor, which intention is to be gathered from all the circumstances of the transaction. . . . In all such transactions, the bill of lading is an *important* item of proof as to the intention, but it is not necessarily conclusive of the question. If the bill of lading shows that the consignment was made for the benefit of the consignor or his order it is very strong proof of his intention to reserve the *jus disponendi*. And on the other hand, if the bill of lading shows that the shipment is made for the benefit of the consignee, it is almost decisive of the consignor's intention to part with the ownership of the property. If the bill of lading does not disclose the person for whose benefit the consignment is made, it is of less weight on the question of the shipper's intention. We have no doubt, however, that if the bill of lading shows a consignment by vendor to vendee, and no other circumstance appears as to the intention, it will be taken as *prima facie* evidence of an unconditional delivery to the vendee."

In *Lund v. Ganahl*, 22 Cal. App. 103, [133 Pac. 501], it was contended, as herein, that the title to the property was not to pass until the full payment of the purchase price, but

it was held that the circumstances were sufficient to justify the conclusion that the transaction amounted to a sale and not a mere agreement to sell, notwithstanding the purchase price had not been fully paid and no bill of sale was executed, the presumption from the transfer of possession being that the title passed, since no different intention was manifested.

We do not think it can be said that a different intention is so clearly shown by other evidence in this case as to nullify the force of the circumstances to which we referred as justifying the trial court's conclusion and to demand a reversal of the judgment. Even if the vendor or the vendee had testified positively that the intention was that the title should vest only when the entire purchase price was paid, we could not say that the trial court was bound to accord full credit to such statement, or to base the findings upon it rather than upon the rational inference from the facts already detailed. However, a reading of the testimony of Duarte and of the president of the corporation is more favorable than otherwise to the contention that the transaction was intended as a completed sale. We think their testimony naturally gives rise to the impression that they so understood it. It is true that appellants claim that Duarte testified that the sale was to be for cash. He was apparently an illiterate witness and was skillfully led by the able counsel for appellants, but the record shows that when apparently he made a statement to that effect he was testifying particularly concerning former sales to the Brinkley-Douglas Company. The question was: "Now, in shipping to the Brinkley-Douglas Fruit Company, did you use to consign it to them?" and he answered: "No, sir; they advanced me the money, the pay was advanced, always before loading I had the money." But, as before stated, when he loaded the car herein he undoubtedly considered the transaction closed and that he virtually had the money, nothing being required except cashing the check at the bank, which was done the next morning.

3. It is next contended that there was no demand under section 689 of the Code of Civil Procedure. Appellants say: "It must be conceded in this case that the only demand made by plaintiff on Cornell, as sheriff, was that contained in the telegram sent on February 28, 1912, which was as follows:

“ S. C. Cornell,

“ Sheriff, Merced, Cal.

“ Understand you have attached car sweet potatoes P. F. E. thirty-nine thirty-five. We have paid for this car, what right have you to attach our goods. Turn car loose at once or will start proceedings for damages. Answer quick.

“ BRINKLEY-DOUGLAS FRUIT Co.’

“ This clearly falls far short of the demand required by C. C. P. 689, and which the sheriff must receive before he would be justified in relinquishing the property.”

But there was a written notice of demand, as shown by the transcript, which it is not denied was received by the sheriff prior to the sale of the attached property. There was, also, a purported indemnity bond given to the sheriff which also appears in the record.

The said notice and demand contained all that is required by section 689 of the Code of Civil Procedure. The affidavit, however, was made by Duarte instead of the corporation. It appears, though, in the claim itself that it was made on behalf of the Brinkley-Douglas Fruit Company. It may be that, strictly speaking, Duarte was not authorized to make the claim for respondent, but as far as the sheriff was concerned he was put upon the same notice as though the affidavit had been made by the Fruit Company itself. As far as the question of agency is concerned, moreover, it is not an unreasonable view that Duarte was acting as the agent of the company throughout the entire transaction, including the purchase of the potatoes. Indeed, his daughter testified that they were purchased for the Brinkley-Douglas Fruit Company. However, the case seems to have been tried upon the theory that Duarte was the purchaser and then the vendor, and we have so regarded it. But the claim and notice provided in said section is for the protection of the sheriff that he may release the property or require an indemnity bond (*Dubois v. Spinks*, 114 Cal. 289, [46 Pac. 95]), and when the sheriff does not object to the sufficiency of the notice, but demands of the creditor that he indemnify him against loss and an undertaking is given without objection on the part of the creditor, the sheriff waives any question as to the sufficiency of the notice or demand. (*Kellogg v. Burr*, 126 Cal. 38, [58 Pac. 306].)

There is some contention in the closing brief of appellants that the indemnity bond received in evidence was not shown to have been given in this particular case, but no such objection was made when it was offered and, besides, we are satisfied with the proof on that point. It is also claimed that the bond was and is a nullity. There may be some question as to its sufficiency and validity, but the sheriff seemed to be satisfied with it. It was his own fault if he did not require a good bond, but, at any rate, he acted upon the claim and notice in behalf of the respondent and he should not now be heard to question the sufficiency of the demand.

4. We think conversion was the proper remedy. "Trover is a proper form of action against a sheriff who seizes or sells the property of one person under process against another." (35 Cyc. 1792.) This is necessarily implied, also, by the language of section 689 of the Code of Civil Procedure.

5. It may have been error for the court to allow the testimony as to the value of the potatoes at Pueblo, Colorado, but, if so, it was entirely without prejudice, for it is clear that the court in its finding was not influenced by such testimony and the value found was established by competent and material testimony, virtually without conflict.

6. There was no failure to find upon every material issue. The possession at the time of the attachment was not a vital consideration. In such action of conversion, the plaintiff is entitled to recover where he proves his ownership and right of possession together with the appropriation of the property by defendant. It is immaterial that the property may be at the time of conversion in the actual possession of a third party.

The court's findings as to the ownership and right of possession, as already set forth, render unimportant the issue of actual possession.

7. It is contended that the judgment against the administrator is erroneous in that it should have directed that it be paid in the due course of administration. (Code Civ. Proc., sec. 1504.) The point is, no doubt, well taken and the judgment in that respect should be corrected on appeal. (*Vance v. Smith*, 124 Cal. 219, [56 Pac. 1031].)

The foregoing includes all the reasons urged by appellants for reversal. We cannot avoid the opinion that they are more plausible than substantial, and that they should not avail to overthrow the conclusion of the lower court, which seems not

only legal, but also entirely just and equitable, in view of the undisputed fact that the potatoes were purchased with the money of respondent, and that there is no doubt of the good faith of the corporation in the transaction.

The judgment against the administrator is modified by adding thereto the following, "and that said judgment be paid in due course of administration," and as thus modified the judgment is affirmed as to both defendants, as is also the order denying the motion of each defendant for a new trial, respondent to recover its costs.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 9, 1917.

[Civ. No. 1820. Second Appellate District.—May 12, 1917.]

J. A. BEALL, Respondent, v. BEKINS VAN AND STORAGE COMPANY (a Corporation), Appellant.

CONTRACT FOR SHIPMENT OF GOODS—DELAY CAUSED FROM LACK OF CRATING—DESTRUCTION BY FIRE—LIABILITY FOR LOSS.—Where a van and storage company in the delivery of certain household effects to a railroad company for the purpose of shipment, neglected to crate certain portions of the goods, as required by its contract, in time to get the goods in the freight depot before it closed for the day, and thereupon stored them in one of their warehouses for safekeeping overnight, and the warehouse was destroyed by fire before the next morning and the goods with it, the company is liable for the value of such goods.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. George H. Cabaniss, Judge presiding.

The facts are stated in the opinion of the court.

R. T. Lightfoot, for Appellant.

James W. Bell, for Respondent.

WORKS, J., *pro tem.*—This is an appeal from the judgment and from an order denying a motion for a new trial.

Appellant and respondent entered into a contract pursuant to which the latter delivered to the former, in two separate lots, certain goods and household effects, all of which were to have been shipped, at the same time, to Lillis, California. On the day that the Van and Storage Company received the second lot of goods it did not deliver them, together with the first lot, to the Southern Pacific Company, as Beall claims it was its duty to do, but stored them in its warehouse for safekeeping overnight. The warehouse was destroyed by fire before the next morning and Beall's property with it. This action was brought to recover the value of the articles and judgment went for Beall.

Under certain very general specifications of particulars, to the sufficiency of which respondent objects, appellant claims that the findings are not supported by the evidence. No one finding is pointed out as lacking such support, but the assault is upon them in general. There are twenty-eight findings and but four specifications of particulars. The language of each of the latter it is most difficult to apply to any finding or findings. Notwithstanding such a situation, we have endeavored so to construe the specifications as to give appellant a hearing on the merits, in accordance with the more recent rulings on the subject of the sufficiency of specifications of particulars. (*American Type Founders' Co. v. Packer*, 130 Cal. 459, [62 Pac. 744]; *McEwen v. Occidental Life Ins. Co.*, 172 Cal. 6, [155 Pac. 86]; *Pacific Gas & Elec. Co. v. Rollins*, 32 Cal. App. 782, [164 Pac. 53].)

Whatever may be said of the specifications of particulars, the argument of appellant is directed at two of the findings, not by number, but in effect. The propriety of these, under the evidence, may be considered together. They are, collectively, to the effect that appellant contracted with respondent to pack the goods in such condition as they were required to be put in for shipment, and that respondent relied upon appellant so to do. Beall was the only witness who testified to the terms of the contract, which was made over the telephone by him and one of the company's representatives. Beall says, in part: "He suggested that the goods ought to be crated. I told him I supposed they ought, but I would leave it to him. He said they would send out that day and get the

goods to be crated, . . . which they afterward did." And again, "that day they came out and got the articles that they decided needed crating." This was on Thursday and Beall was to have the remainder, or second lot, of goods ready for a trip of appellant's vans on Monday, the day the shipment was to be made; but, according to the effect of Beall's testimony, those were the articles, only, which appellant had decided need not be crated, although Beall does use the word "pack" as describing what he was to do with them. The two findings are supported by the evidence.

The trial court found that "the defendant expressly agreed and undertook to have the goods in transit, and to deliver them to the connecting carrier on Monday, October 9, 1911." This particular finding is not attacked, but the contention is made that delivery to the railway on Monday was excused, and a deposit of the goods in the warehouse that night was necessitated by the fault of Beall. This particular question relates to what we have called the second lot of goods. They were delivered at appellant's warehouse by its vans between 2:30 and 3 in the afternoon of Monday. The evidence shows that the Southern Pacific Company does not receive freight at its Los Angeles station after 4:35 each day. When the second lot of goods reached the warehouse it transpired that there were two uncrated trunks in the load, and the evidence shows that the railway does not receive trunks for shipment as freight unless they are crated. Appellant proceeded to crate the trunks in question, and its witnesses testified that the delay incident to the work prevented the delivery of the shipment at the railway station before the freight depot was closed for the day. All of Beall's goods were then deposited in appellant's warehouse for the night. The appellant contends that the trunks should have been delivered to it by Beall already crated, that he was therefore responsible for the delay and caused the detention at the warehouse. The answer to this position is that the trial court properly found that appellant had agreed to pack the goods for shipment. When the vans took from Beall on Thursday such of the articles as, to quote him again, "they decided needed crating," they should have taken the trunks with the other articles selected by them.

Because of the delay occasioned by the preparation of the trunks for shipment, and the consequent detention at the

warehouse, and as it was stipulated at the trial that the fire was not caused through negligence, appellant asserts that the question of its liability should be measured by the law affecting warehousemen instead of carriers, and many authorities are cited to propositions distinguishing the two. We need not enter into a discussion of the merits of this contention. It has no application to the actual case. Enough has been said to show that appellant contracted to specially prepare for shipment such portion of Beall's goods as needed such preparation, and to deliver the entire lot of goods to the railway on Monday. Whether it acted as a warehouse-keeper or as a carrier, it did not comply with its agreement, and its failure to comply was the proximate cause of the damage to respondent.

The judgment and order are affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2031. First Appellate District.—May 14, 1917.]

MARY E. WILLIAMS, Respondent, v. SAVINGS BANK OF SANTA ROSA (a Corporation), Defendant; ERNEST D. WOODMAN, as Executor, etc., Appellant.

TRUST—CHANGE OF FORM OF SAVINGS BANK ACCOUNT.—Where a depositor in a savings bank in carrying out her repeatedly expressed desire to so arrange her account that her sister with whom she had lived, and who had taken care of her in her invalid condition for many years, might, during their joint lives, draw on the account and receive the residue upon death without probate, handed the pass-book to her niece with instructions to take it to the bank and have the account changed in such a manner as to carry out her desires, and the bank, after being directed in writing by the depositor to add the sister's name to the account, entered the account in the book as subject to the check of either or the survivor of them, and the book was thereupon returned to the depositor, who, after examining it, expressed herself as greatly satisfied with the change, a trust was thereby created in the deposit for the benefit of the sister.

Id.—RIGHT TO DEPOSIT UNDER BANKING ACT.—Such a case also comes within the purview of section 16 of the Bank Act of March 1, 1909

(Stats. 1909, pp. 86-90), as amended in 1911 (Stats. 1911, p. 1003), making such persons joint owners in the deposit with the right of survivorship.

APPEAL from an order of the Superior Court of Sonoma County denying a new trial. Thomas C. Denny, Judge.

The facts are stated in the opinion of the court.

R. L. Thompson, Wilson & Wilson, and P. L. Benjamin, for Appellant.

James W. Oates, and Gibson & Woolner, for Respondent.

KERRIGAN, J.—This is an action brought by plaintiff to recover a sum of money on deposit in the defendant bank, which deposit is also claimed by the defendant Woodman as executor of the will of Laura M. N. Huntoon, deceased. Plaintiff recovered judgment, and the appeal is by said executor from an order denying his motion for a new trial.

Mrs. Laura M. N. Huntoon died at the age of eighty years, being a widow and childless. For a long time before her death she had been afflicted with paralysis and was able to get about only in a wheel-chair. She had lived with the plaintiff at the latter's home for twelve years prior to her death, during all of which time she was taken care of by plaintiff, and by Mrs. Laura Cragin, plaintiff's daughter. The tie that bound these women was very close and affectionate. Mrs. Huntoon left a will dated about five years before the time of her death, by the terms of which she disposed of her estate, consisting of real and personal property estimated to be worth over one hundred and seventeen thousand dollars, dividing it among her heirs, viz., the plaintiff and some nephews and nieces. A legacy of ten thousand dollars was left to the plaintiff, and a like legacy was given the appellant, who is a nephew of said deceased. They also were each to receive under the terms of the will the residue of the estate. At the time of her death the deceased had a deposit in the defendant bank. Subsequent to making her will she had frequently expressed an intention to make provision for the plaintiff in addition to the one contained in that instrument. It was her desire often repeated so to arrange certain savings bank accounts that the plaintiff could during their joint lives draw

on them just as she herself might do, and that upon her death any money remaining on deposit would go to the plaintiff without the necessity for probate. Accordingly, in the year 1912, she handed to her niece, Mrs. Cragin, the pass-book issued to her by the defendant bank, with instructions to take it to the bank and have the account changed in such a manner as to carry out her desires in the respect indicated. Mrs. Cragin followed these directions. The cashier of the bank, with whom Mrs. Cragin's interview was had, requested that Mrs. Huntoon's directions be put in writing, whereupon Mrs. Huntoon addressed a note to the bank as follows: "Will you please add my sister's name, Mrs. M. E. Williams, to my bank account, which will make it more convenient to me." Upon the receipt of this note the bank cashier entered the account in the pass-book as subject to the check of "Mrs. Huntoon or Mrs. M. E. Williams, either, or the survivor of them." The book was at once returned to Mrs. Huntoon, who, after examining it, commented upon that part of the bank's notation which referred to "the survivor," and expressed herself as greatly satisfied with the change in the account, saying that it was just what she wanted done.

Section 16 of the Bank Act of March 1, 1909 (Stats. 1909, pp. 86-90), as amended in the year 1911 (Stats. 1911, p. 1003), provides: "When a deposit with a bank shall be made by any person in the names of such depositor and another person or persons, and in form to be paid to either or the survivor or survivors of them, such deposit thereupon, and any additions thereto made by either of such persons upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to either during the lifetime of all or any or to the survivor or survivors after the death of one or more of them, and such payments and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposit."

It appearing that the deceased did not surrender dominion and control over the funds in the bank, the facts of the case as narrated above would not support the theory of a valid gift; but we have no doubt under the authorities in this state that the circumstances related do show a trust in the deposit

for the benefit of the plaintiff. In the case of *Drinkhouse v. German Sav. & Loan Society*, 17 Cal. App. 162, [118 Pac. 953], it was held that where a deposit was made in a savings bank in the name of the depositor and another person payable to either, in order, as declared by the depositor at the time of making it, that if anything happened to her such other person "could take the pass-book and go to the bank to withdraw the money," a trust was thereby created in favor of such other person in the residue of the deposit at the death of the depositor, notwithstanding that the latter retained exclusive possession of the pass-books, and the right to withdraw all or any portion of the deposit in her lifetime. (See, also, *McCarthy v. Holland*, 30 Cal. App. 495, [158 Pac. 1045].)

Moreover in this case we are of the opinion, as in the case last cited, that the evidence deduced at the trial brings it within the purview of section 16 of the Bank Act, *supra*, and was sufficient to constitute the plaintiff and the deceased joint owners in the deposit with the right of survivorship. A similar statute was so construed in New York (*Clary v. Fitzgerald*, 155 App. Div. 659, [140 N. Y. Supp. 536]; *McCarthy v. Holland*, 30 Cal. App. 495, [158 Pac. 1045].) We think that the complaint stating, as it does, the facts of the case, is sufficient to enable the plaintiff to rely upon the theory that the deposit was for her benefit, as well as upon the theory that under the circumstances of the case she became the owner of the remainder of the deposit upon the death of Mrs. Huntoon according to the provisions of the section of the Bank Act set forth above.

The order is affirmed.

Lennon, P. J., and Richards, J., concurred.

[Civ. No. 2032. First Appellate District.—May 14, 1917.]

MARY E. WILLIAMS, Respondent, v. UNION TRUST SAVINGS BANK OF SANTA ROSA (a Corporation), Defendant; ERNEST D. WOODMAN, as Executor, etc., Appellant.

TRUST—CHANGE OF FORM OF SAVINGS BANK ACCOUNT.—Where a depositor in a savings bank in carrying out her long existing intention to so arrange her account that both she and her sister, with whom she had lived and who had taken care of her in her invalid condition for several years, might separately draw upon it, and upon her death the balance become the property of the sister without the formalities of probate proceedings, signed a card, at the request of the bank, providing that the two might draw on the account, but which said nothing as to the right of the survivor to the balance of the deposit, and after the card was returned to the bank expressed herself as satisfied with the transaction, a trust was thereby created in the deposit in favor of the sister, where it was shown that the card signed was the form then in use by the bank in making deposit accounts in the name of more than one person subject to the check of either and balance payable to survivor.

APPEAL from an order of the Superior Court of Sonoma County denying a new trial. Thomas C. Denny, Judge.

The facts are stated in the opinion of the court.

R. L. Thompson, Wilson & Wilson, and P. L. Benjamin, for Appellant.

James W. Oates, for Respondent.

KERRIGAN, J.—This is an appeal by Ernest D. Woodman, one of the defendants, from an order denying his motion for a new trial in an action brought by the plaintiff against said Woodman, as executor of the will of Laura M. N. Huntoon, deceased, and the defendant bank to recover the balance of a certain deposit in said bank.

This case, in many of its facts, is like the case of *Mary E. Williams v. Savings Bank of Santa Rosa et al.*, *ante*, p. 655, [166 Pac. 366]. The deceased, at the time of her death, had been an invalid for about twelve years. She and the plaintiff were sisters and were very fond of each other.

The deceased lived with the plaintiff and had been tenderly nursed by her all of that time, and in appreciation of such loving care, and in consideration of the bond of affection existing between them, she had intended for a long time, it appears from the record, to arrange her savings bank account so that both she and the plaintiff might separately draw upon it, and that on her death the balance of the deposit should belong to and become the property of the plaintiff without the formalities of probate proceedings. Accordingly, some time in the early part of the year 1912, the deceased sent the plaintiff's daughter, Mrs. Laura Cragin, to the defendant bank to request that the necessary changes be made in the account so as to effectuate her theretofore often expressed desire concerning the matter. Mrs. Cragin called upon the cashier of the bank, and, according to her testimony, told him that her mother and the decedent desired that the account be changed so that either the plaintiff or the deceased might draw upon it, and that when the decedent "was gone" the money in the bank would belong to the plaintiff. The cashier thereupon gave to Mrs. Cragin a signature card to be signed by her mother and aunt. This card was filled in with the desired signatures and returned to the bank, but provided only by its terms that either of the two sisters might draw against the account, saying nothing as to the right of the survivor to the balance of the deposit. The cashier, however, testified that this was the form then used by the bank in making deposit accounts in the name of more than one person subject to the check of either and balance payable to the survivor. After the signature card had been filled in and returned to the bank the deceased, believing that her instructions had been carried out, expressed herself as relieved in mind about a matter that had been worrying her for some time, and that she was glad that upon her death so much of the fund as then remained would go to the plaintiff without the necessity of probate proceedings.

There is some doubt, under the circumstances of this case, whether it falls within the provisions of section 16 of the Bank Act of 1911; but there is no doubt in our minds that such circumstances show the creation of a trust for the benefit of the plaintiff under the rule laid down in the case of *Booth v. Oakland Bank of Savings*, 122 Cal. 19, [54 Pac. 370], as re-

cently adopted and applied by this court in the case of *Drinkhouse v. German Sav. & Loan Society*, 17 Cal. App. 162, [118 Pac. 953].

Order affirmed.

Lennon, P. J., and Richards, J., concurred.

[Civ. No. 2238. Second Appellate District.—May 14, 1917.]

BAILEY ORNAMENTAL IRON COMPANY (a Corporation), Appellant, v. EMMA M. GOLDSCHMIDT et al., Respondents.

MECHANIC'S LIEN—IMPROVEMENT NOT EXCEEDING ONE THOUSAND DOLLARS—LAW PRIOR TO CODE AMENDMENTS OF 1911.—At all times prior to the amendments of sections 1183 and 1184 of the Code of Civil Procedure, which became effective on June 30, 1911, the law permitted an owner of real property, in causing the construction of any improvement thereon at a cost of not more than one thousand dollars, to provide for such improvement by a contract not filed in the recorder's office, or even by an oral contract, and to pay the consideration therefor whenever it pleased him to do so; and the provisions of such code with reference to putting in writing building contracts, and filing them for record, and as to the mode and time of payment and the withholding of a percentage of the contract price, were not applicable to such an improvement.

Id.—ORAL CONTRACT UNDER ONE THOUSAND DOLLARS—EXECUTION PRIOR TO CODE AMENDMENTS—PERFORMANCE SUBSEQUENT—AMENDMENTS INAPPLICABLE.—The amendments of 1913 to sections 1183 and 1184 of the Code of Civil Procedure are not applicable to an oral contract for the construction of a balcony on a dwelling entered into prior to the date that such amendments became effective, where the amount of the contract price was less than one thousand dollars, although the work was not commenced until after such amendments became effective.

Id.—RIGHT OF LIEN—STATUTORY ENACTMENT ESSENTIAL.—The declaration of article XX, section 15, of the constitution that mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished, and that the legislature should provide, by law, for the speedy and efficient enforcement of such liens, is inoperative except as supplemented by legislative action, and until the enactment of the necessary statute the lien contemplated by the constitution does not exist.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Finlayson, Judge.

The facts are stated in the opinion of the court.

Andrew J. Copp, Jr., for Appellant.

E. B. Coil, for Respondents.

CONREY, P. J.—Action to enforce a mechanic's lien claimed by the plaintiff. The plaintiff appeals from the judgment.

In March, 1911, the defendant Emma M. Goldschmidt, being about to cause the erection of a dwelling-house on land owned by her in the city of Los Angeles, entered into an oral contract with the Imperial Iron & Machine Company, under which that company agreed to construct for her a certain iron balcony as a part of the proposed building. The price for the work was to be \$268; no time for the payment being named in the agreement. Mrs. Goldschmidt paid an installment of this price on May 18 and the remainder thereof on June 3, 1911, although at those times none of the work had been done. On June 26, 1911, the Imperial Iron & Machine Company entered into an oral contract with the plaintiff for the construction of said balcony. The work was commenced by the plaintiff on the seventh day of July and completed on the sixteenth day of August, 1911. Later the building was completed, and a notice of claim of lien in due form was filed for record by the plaintiff.

At all times prior to June 30, 1911, the law permitted the owner of real property, in causing the construction of any improvement thereon at a cost of not more than one thousand dollars, to provide for such improvement by a contract not filed in the recorder's office, or even by an oral contract, and to pay the consideration therefor whenever it pleased him to do so; and the provisions of the Code of Civil Procedure with reference to putting in writing building contracts, and filing them for record, and the provisions of that code relative to the mode and time of payment and the withholding of a percentage of the contract price, were not applicable thereto. "It was permissible for the parties to contract for the payment of the whole amount to the contractor before the commencement of the work." (*Denison v. Burrell*, 119 Cal. 180,

[51 Pac. 1]; *Southern California Lumber Co. v. Jones*, 133 Cal. 242, [65 Pac. 378].)

Sections 1183 and 1184 of the Code of Civil Procedure were amended by a statute which became effective on June 30, 1911. (Stats. 1911, p. 1313 et seq.) If these amendments are applicable to the present case, the plaintiff was entitled to enforce its claim of lien; otherwise the judgment in favor of defendants should be affirmed. The argument for appellant relies upon that section of the state constitution which declares that "mechanics, materialmen, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens." (Const., art. XX, sec. 15.) Appellant contends that its substantive right is given by the constitution; that the mechanic's lien law relates only to the remedy; and that therefore no obligation of contract is violated by allowing it a lien for construction work which was not commenced until July 7, 1911, although it was done pursuant to contracts entered into prior to the 30th of June. This contention cannot be sustained. Referring to the section of the constitution quoted above, the supreme court said: "This declaration of a right, like many others in our constitution, is inoperative except as supplemented by legislative action. So far as substantial benefits are concerned, the naked right without the interposition of the legislature is like the earth before the creation, 'without form and void,' or to put it in the usual form, the constitution in this respect is not self-executing." (*Spinney v. Griffith*, 98 Cal. 149, [32 Pac. 974].) The foregoing decision could not have been rendered except upon the theory that the constitutional provisions do not create a complete right and that the actual right of lien, as well as the remedy for its enforcement, is derived from the statute, and that until the enactment of the necessary statute the lien contemplated by the constitution cannot exist.

It is a familiar rule that the law in force at the time a contract is executed enters into and forms a part of the contract. (*Barnitz v. Beverly*, 163 U. S. 118, [41 L. Ed. 93, 16 Sup. Ct. Rep. 1042]; *Welsh v. Cross*, 146 Cal. 621, 624, [106 Am. St. Rep. 63, 2 Ann. Cas. 796, 81 Pac. 229].) When Mrs. Goldschmidt contracted with the Imperial Iron & Machine

Company for the construction of the balcony and paid that company for the work, there was not in existence any law under which, after she paid the contract price, her property could be subjected to a "mechanic's lien" of a subcontractor whom the contractor might thereafter employ to do the work. She was under no obligation to prevent the contractor from having the work done by third persons, and she was not bound to take notice of the fact that on and after the 30th of June there would be a different law governing such contracts.

Counsel for appellant has referred to a few California decisions which he thinks favor his position; but, in our opinion, they do not benefit his case. The principal decision discussed by him on this point is *McCrea v. Craig*, 23 Cal. 522. There it appeared that on April 26, 1862, a law was passed in relation to liens of mechanics and others, which took effect June 25, 1862, the last section of which repealed all prior laws upon the subject. The action was one to enforce a lien for materials furnished to the contractor. The plaintiff had commenced to furnish those materials prior to June 25th, but did not complete the furnishing of them or file his notice of lien until after the new law went into effect. Although his lien was deemed to have been acquired, and his notice related back to the time when he commenced furnishing the materials, nevertheless it was held that, after the new statute went into effect, all subsequent acts or proceedings relating to the lien or its enforcement were governed by and must have been in accordance with its provisions. The right of lien came within the earlier statute, but the subsequent steps of procedure for the enforcement of the lien were governed by the law as amended.

In *Andrews & Johnson Co. v. Atwood*, 167 Ill. 249, [47 N. E. 387], it appeared that Atwood, the owner of the property, entered into a contract with a contractor for the erection of a building upon his lot. Thereafter and while the building was in course of construction, the mechanics' lien law was amended so as to extend lien rights to a class of persons not included in the law as it was when the contract was made. In the decision the new class of claimants was conveniently designated by the term "sub-subcontractors." The court said that if the amending act should be held to govern contracts entered into before the act was passed, it would be an act impairing the obligation of contracts and would clearly

fall within the inhibition of the constitution. (See, also, *Kendall v. Fader*, 199 Ill. 294, [65 N. E. 318].)

In *Bass v. Williams*, 73 Mich. 208, [41 N. W. 229], a similar question arose. The court said: "Applying the statute coming in force in June, a burden was at once cast upon the owners, which they did not assume when the contract was made—that is, to refuse payment to Williams until they had gone among the men and inquired of each and every one of them if their labor had entered into the shingles, and, if so, whether they had each been paid; or to have kept a strict account of each laborer's time, and the work done, and then to see that each was paid before making payments to Williams, or to pay to Williams at the peril of having the shingles seized and held under the lien which the statute gives. We are satisfied that this statute cannot be applied to a contract made before the statute took effect. It impairs the obligation of the contract, and comes plainly within the inhibition of the constitution." Applying to this case the reasoning of the foregoing decisions, we think that the amendments of 1911 are not applicable in this case and that no right of lien became vested in the plaintiff.

The judgment is affirmed.

James, J., and Works, J., *pro tem.*, concurred.

[Civ. No. 2046. First Appellate District.—May 15, 1917.]

JOHN RUDIN et al., Trustees, etc., Appellants, v. JAS. W. REA et al., Respondents.

SURETYSHIP—BOND FOR PERFORMANCE OF DUTIES OF SALES AGENT—SETTLEMENT OF SHORTAGE UNKNOWN TO SURETIES—FRAUD—STATUTE OF LIMITATIONS.—Where the sales agent of a book selling and distributing corporation, who had given a bond for the faithful performance of his duties, upon becoming indebted to the corporation in a considerable sum of money, made a settlement with the corporation without the knowledge of the sureties on the bond, by turning over to the corporation certain securities, and later it was discovered that the securities had been embezzled by such agent and the corporation lost the benefit of them, such fraudulent acts of the

agent did not extend the time to sue the sureties on the bond, and an action brought more than four years after the obligation to pay the money arose is barred by the statute of limitations.

APPEAL from a judgment of the Superior Court of Santa Clara County. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

Stanley Moore, and Wilder Wight, for Appellants.

E. M. Rosenthal, E. M. Rea, and A. A. Caldwell, for Respondents.

THE COURT.—Action upon a bond. Judgment went for the defendants, Jas. W. Rea and V. Koch, and plaintiffs appeal.

The facts of the case are briefly these: A. F. Palmer was an agent of the King-Richardson Company, a corporation engaged in the business of selling and distributing books, and in the course of that agency sold the books of the King-Richardson Company, received payments on account of such sales, and made and reported collection to the company. It became necessary, according to the rules of the company, for Palmer to give a bond for the faithful performance of his duties as such agent, and he gave the bond upon which this suit is brought, signed by the sureties Koch and Rea. Subsequently Palmer was found to be indebted to his employer in a considerable sum of money, and, without the knowledge of his sureties upon the bond, and without any information imparted to them, an arrangement was entered into between the King-Richardson Company and Palmer by which the latter undertook to transfer to his employer certain securities in settlement of his obligation and liability to it. Some considerable time after that arrangement had been made it was discovered that Palmer had embezzled these securities, the real owners of them appeared, and the King-Richardson Company lost the benefit of them. Thereupon through its trustees it brought suit upon the bond. That suit was brought more than four years after the obligation otherwise would have arisen on the bond. The statute of limitations was pleaded by the sureties.

As against the statute it is urged by the plaintiffs that the fraudulent acts of Palmer in making the settlement with the company by means of the transfer to it of the securities referred to, and the failure of the company to discover the facts of the fraud, extended the term of the statute so as to permit them to recover against the sureties on the bond. The lower court held, however, that the term of the statute was not extended by those acts on the part of Palmer, and the only question before us in this case is whether or not the alleged fraudulent acts of Palmer worked an extension of the statute of limitations so as to bring this suit within its term.

We are of the opinion after a careful examination of the cases that the trial court was not in error in holding that the cause of action against the sureties was barred by the statute. That being so, the other points in the case become immaterial, and it is not necessary to discuss them; but upon the ground that the statute of limitations barred the action against the sureties the judgment will be affirmed. It is so ordered.

[Civ. No. 1826. Second Appellate District.—May 15, 1917.]

**EDGAR BROS. COMPANY (a Corporation), Respondent,
v. SCHMEISER MANUFACTURING COMPANY (a
Corporation), Appellant.**

CONTRACT—AGENCY FOR SALE OF MANUFACTURED ARTICLES—INCOMPLETE CONTRACT—PAROL EVIDENCE INADMISSIBLE.—In an action to recover commissions on the sales within certain territory of various articles manufactured by the defendant, based upon a purported agency contract placed at the bottom of an "order ticket," which, omitting signatures, was in the following language: "To have exclusive agency in Imperial Valley for 1912 and by ordering one car before Feb. 1st, 1913, can have the agency for same season," it is error to admit parol evidence of the missing terms of the agency.

ID.—CONTRACT NOT PERFORMABLE WITHIN YEAR—STATUTE OF FRAUDS.—Such a contract is within the statute of frauds as one not to be performed within a year, where it was shown by testimony of witnesses that the term "season," as used in the contract, expired in the month of October.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

A. G. Bailey, and Phil D. Swing, for Appellant.

McPherrin & Nichols, for Respondent.

WORKS, J., *pro tem.*—This is an appeal from the judgment.

The respondent claims to have been an exclusive agent of appellant for the year 1913, the agency pertaining to the sale within certain territory of manufactured articles which were the output of appellant. The action was commenced to recover commissions on various of such articles sold in the territory during the year by the Schmeiser Company itself, and the Edgar Bros. Company had judgment for the amount of those commissions.

The agency contract was placed at the bottom of an "order ticket," showing a list of articles ordered by the Edgar concern from the Schmeiser Company, and was, omitting the signatures, as follows:

"To have exclusive agency in Imperial Valley for 1912 and by ordering one car before Feb. 1st, 1913, can have the agency for same season."

The appellant contends that the agreement was inoperative for uncertainty and incompleteness and the claim must be sustained. The paper is so lacking in the terms going to make a workable contract of agency that it is unnecessary for us to specify them.

A considerable amount of oral evidence was offered in an endeavor to supply the missing members, and it was received by the trial court in the face of objections by the appellant. The evidence was improperly admitted. Conceding that the expression "one car" and the word "season" called for explanation, there was nothing further in the paper which required the aid of parol evidence. The terms of the agency were neither uncertain nor ambiguous—they were simply missing.

The testimony of witnesses showed that the "season" of 1913, as that term is used in the agreement, expired about October. The contract was entered into during April, 1912.

It was, then, not to be performed within a year, and was therefore within the statute of frauds. (Civ. Code, sec. 1624, subd. 1; *Wickson v. Monarch Cycle Mfg. Co.*, 128 Cal. 156, [79 Am. St. Rep. 36, 60 Pac. 764].) For the reasons given above, it was an insufficient memorandum under the statute.

It is not necessary to consider other points which are urged by the appellant.

The judgment is reversed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2050. First Appellate District.—May 16, 1917.]

LOUISE CARLINI et al., Appellants, v. LOUIS SCHULTZ COMPANY, INC. (a Corporation), Respondent.

LEASE—USE OF PREMISES FOR IMMORAL PURPOSES—INTERFERENCE BY MUNICIPAL AUTHORITY—ACTION FOR RELIEF—INSUFFICIENT COMPLAINT.—In an action for the cancellation of a lease or its modification in the way of a reduction of rent, the complaint fails to state a cause of action for relief either in law or equity, where it appears therefrom that both the lessor and lessee had knowledge of the fact that the premises were to be used for the purposes of prostitution, notwithstanding it was alleged that the premises by reason of the interference of municipal authority were no longer permitted to be used for such purposes.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. G. E. Crothers, Judge.

The facts are stated in the opinion of the court.

Wm. Hoff Cook, for Appellants.

Charles W. Slack, and Chauncey S. Goodrich, for Respondent.

THE COURT.—This is an appeal from a judgment in favor of defendant entered upon an order sustaining a demurrer to the second amended complaint after the plaintiff's refusal to further amend, in an action in which the relief asked was

the cancellation of a lease or a modification thereof so as to make its terms less onerous upon the lessee.

The amended complaint is uncertain in many of the respects pointed out in the demurrer; but passing those defects, and addressing ourselves to the main objection, viz., want of facts averred in said amended complaint to constitute a cause of action, it appears from the amended pleading that "the said leased premises were located in what was then and there known as a 'segregated district' of San Francisco, . . . and said district was denominated and designated as the 'segregated district' by police authorities of San Francisco, for the purpose of permitting prostitutes and men with whom they might cohabit and other people of 'easy virtue' to reside and pursue their said life and calling in said 'segregated and restricted district' without molestation or interference by the police in so doing; . . . and at said time both the lessor of said leased premises, and its successor in estate herein, the defendant, and the plaintiffs herein, were well acquainted with the aforesaid facts in relation to such segregated and restricted district; and by reason of the aforesaid conditions the rooms in said premises so leased were rented and used by the aforesaid class of people without any molestation or interference by the police, as all of the aforesaid parties, as lessors and lessees, well knew, and almost all of the rental to be derived from said premises was to be and was from the renting of said rooms in said premises for the purposes and kind of people as aforesaid, as all of said parties, as lessors and lessees, well knew, and the revenue derived and to be derived from such renting of said rooms in said leased premises was the material consideration for the payment of the rental, as provided in the aforesaid lease; . . . " and that "the aforesaid lease was so made as aforesaid with a full and complete knowledge and understanding upon the part of the lessor and lessee therein named, that the rooms in the said leased premises were to be so used and rented out by the lessee to said class of people as aforesaid. . . . " Then follow averments that the said "segregated district" has been abolished by the police commission, and that since said abolition "the lessees of said premises under the aforesaid lease have been and are unable to rent rooms in said leased premises under the same conditions as they were at the time of making said lease, . . . and

that the material part of the consideration for said lease . . . was the income and revenue to be derived from so doing." The relief prayed for is the cancellation of the lease or its modification in the way of a reduction of rent.

For the purposes of the demurrer the foregoing allegations of the complaint must be taken as true. We think it very plain, therefore, without going further into the averments of the complaint, that the lessee and its assignee (plaintiffs herein) have no standing in a court either of law or equity, and that the demurrer to the complaint was properly sustained.

Judgment affirmed.

[Civ. No. 1873. Second Appellate District.—May 16, 1917.]

[Civ. No. 2118. Second Appellate District.—May 16, 1917.]

C. L. VOSS, Respondent, v. ADOLPH LEVI, Appellant.

LANDLORD AND TENANT—VIOLATION OF COVENANT PROHIBITING SUBLETING—ACCEPTANCE OF RENT FROM OCCUPANT—GUARANTOR OF ORIGINAL LESSEE NOT RELEASED.—Under the terms of a lease containing a covenant prohibiting the subletting of the demised premises without the written consent of the lessor, the guarantor of the lessee is not released from his contractual obligation, by the mere fact that a transfer of the business conducted on the demised premises was made, and that the lessor's agent accepted the rental from the transferee and gave him receipts therefor in his own name, or by the fact that the lessor's agent informed the occupant that he might move out if he desired, in the absence of a surrender of the premises and an acceptance thereof.

APPEALS from judgments and order denying a new trial of the Superior Court of San Diego County. C. N. Andrews, Judge.

The facts are stated in the opinion of the court.

Hoff & Chatterson, for Appellant.

E. T. Lannon, for Respondent.

JAMES, J.—On the twenty-fourth day of January, 1911, one Trepte leased to the Diamond Carriage & Livery Company, a corporation, certain real property in the city of San Diego for a period of five years for a total rental of seven thousand five hundred dollars, which was made payable monthly in advance at the rate of \$125 each month. The lease contained a term prohibiting subletting without the written consent of the lessor. Adolph Levi and J. E. Connell signed the lease as guarantors. On the twelfth day of June, 1913, Trepte assigned the lease to Voss, the plaintiff herein. The plaintiff was not a resident of the state, but was at all times material to this controversy represented by E. E. Selmser, who resided in the city of San Diego. The lessee company, by reason of nonpayment of state license tax, forfeited its charter on November 30, 1912. The stock of the company had theretofore been transferred to a firm called Davis & Crawford. Subsequent thereto Davis & Crawford transferred to Adolph Levi, and Edgar Levi and they in turn transferred to A. C. Griffith, who in turn transferred to one Morse. In September, 1914, Morse moved out and left the property vacant. The business during all of these times was conducted either under the name of "Diamond Carriage & Livery Company," or "Diamond Carriage Company." After the transfer of the lease by Trepte, the rent was paid to the agent of the plaintiff, who received checks from individuals occupying the premises and gave receipts to and in the names of such individuals. Morse had a conversation with Selmser, the agent of the plaintiff, prior to September, 1914, in which this agent informed Morse that he could surrender the property at any time he desired, as more rental could be secured by the owner than was being paid under the lease. Morse testified that he asked for a reduction of rent, to which the agent would not consent, and was told that if he wanted to give up the premises he would be released. He further testified that he moved out, but after he moved out rent was demanded from him by Selmser. No rent was paid after the first day of September, 1914, and on about the 19th of January, 1915, Selmser, on behalf of plaintiff, took possession of the premises, made material changes in the building by having stalls taken out and a cement floor put in, all in preparation to change the use of the building from that to which it had theretofore been put. There were two actions brought for rent by which the plain-

tiff sought to recover against Adolph Levi as guarantor under the lease, Connell having died in the meantime. The complaint in the first action was filed on November 18, 1914, and in that action the rental for the months of September, October, and November, 1914, amounting to \$375, was sought to be recovered. Thereafter, in June, 1915, another action was brought to recover rental alleged to have accrued for the months of December, January, February, March, April, and May, 1915. In the first action recovery of the amount sued for was allowed by the court. In the second action, the court found that the lease had been terminated on the nineteenth day of January, 1915, when the plaintiff took possession and assumed control of the premises, and therefore allowed a recovery only of rental for the month of December and nineteen days in January, 1915. The defendant appealed from the judgment in the first case and from an order denying a motion for a new trial. The defendant also appealed from the judgment entered in the second case. The plaintiff was dissatisfied with the judgment in the second case, because the court limited the recovery to the amount of rental accruing only to the 19th of January, 1915, and his appeal from that judgment is also brought here; the appeals being numbered respectively, Civil 1873 and 2118. By a stipulation entered into between counsel, these appeals have been consolidated and are presented together.

There is really but one point material for consideration as determinative of both appeals, and that is: Was the lease originally entered into by the corporation lessee terminated prior to September, 1914, by surrender of the premises and the acceptance thereof by the assignee of the lessor? In addition to facts shown, and which have been recited in brief in the foregoing, it also appeared in evidence that no written consent had ever been given by the lessor or his assignee, or the agent of the latter, to the assignment of the lessee's interest. It did appear that the several persons holding possession under the lease paid the rental to the agent of the owner, and that he issued to them receipts in their own names. It did not appear, however, in any other way than as such acts would give evidence of, that the owner ever consented to release the original lessee or the guarantors on the lease from the obligations of their contract. The business carried on on the premises up to the time that Morse moved out was always conducted under

the name of the "Diamond Carriage & Livery Company," or the "Diamond Carriage Company," and the several persons who occupied the premises claimed to so occupy them under the lease as originally made and under all the particular terms thereof. Furthermore, the possession of the premises was passed to each by the act of the preceding occupant, the owner having no part whatever in making delivery of the premises to any of the occupants, except to the original lessee. The mere acceptance of rental from the person in possession of the premises could not amount to a consent to release parties from the obligations of their written contract. Such obligations so solemnly expressed are not to be so easily put an end to. Notwithstanding that the agent, Selmsen, told Morse prior to September, 1914, that he might move out if he desired, that permission would not become of binding effect upon the lessor until the surrender of the premises had been accepted by the latter. Such acceptance of surrender was evidenced only at the time the plaintiff, on the nineteenth day of January, 1915, took possession of the premises and proceeded to have them remodeled. That an acceptance of surrender was then completely had, we have no doubt. The court's conclusion on that matter we fully agree with. The cases of *Bradbury v. Higginson*, 162 Cal. 602, [123 Pac. 797], and *Welcome v. Hess*, 90 Cal. 507, [25 Am. St. Rep. 145, 27 Pac. 369], which are cited by both counsel in the case, furnish no argument which, in our opinion, proposes any different conclusion than that which we have expressed.

The judgment and order in case No. 1873 are affirmed. The judgment in case No. 2118 is affirmed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

[Civ. No. 1597. Third Appellate District.—May 16, 1917.]

MONO POWER COMPANY, Respondent, v. CITY OF LOS ANGELES, Appellant.

PLACE OF TRIAL—ACTIONS BETWEEN COUNTIES—CONSTITUTIONALITY OF CODE PROVISION.—Section 394 of the Code of Civil Procedure, as amended in 1915, relative to the place of trial of actions between counties, cities, and cities and counties, is not unconstitutional, as class legislation, since it does not appear from the statute that an arbitrary selection has been made from among a large number of persons between whom and the persons favored (cities, counties, cities and counties) there is no reasonable distinction or substantial difference justifying the inclusion of the one and exclusion of the other from such privilege.

ID.—MOTION FOR CHANGE OF VENUE—AFFIDAVIT OF MERITS AND WRITTEN DEMAND NOT REQUIRED.—A motion for change of place of trial under section 394 of the Code of Civil Procedure need not be made at the time when the defendant answers or demurs, nor need it be accompanied by an affidavit of merits and a written demand for change of place of trial, as required by section 396 of such code.

APPEAL from an order of the Superior Court of Mono County denying a motion for change of place of trial. P. R. Parker, Judge.

The facts are stated in the opinion of the court.

Albert Lee Stephens, City Attorney, W. B. Mathews, S. B. Robinson, and Wm. B. Himrod, for Appellant.

J. P. O'Brien, for Respondent.

CHIPMAN, P. J.—The action was to condemn to plaintiff's use certain land situated in Mono County in which defendant is alleged to have an interest. The complaint was filed January 13, 1913, and defendant answered June 28, 1915. Thereafter, defendant gave notice that, on September 1, 1915, it would move for a change of the place of trial from Mono County “to the superior court of such county of the state of California, as the parties to the above-entitled cause may agree upon, by stipulation in writing, or, made in open court, and entered in the minutes, or, if they do not agree, then the

nearest or most accessible court, where the like objection or cause for making the order does not exist. Said motion will be made upon the ground that the said proceeding is brought against the city in a county in which the plaintiff is doing business." The motion was made under section 394 of the Code of Civil Procedure, upon the papers, files, and records of the court, in said action and upon the affidavit of S. B. Robinson, one of the attorneys for defendant, in which he deposed that "the defendant, City of Los Angeles, is a city situated in the county of Los Angeles, state of California, and plaintiff, Mono Power Company, is doing business in the county of Mono, State of California, in which county the said proceeding is pending." It appeared from the counter-affidavit of J. P. O'Brien, attorney for plaintiff, that said notice of motion to change the place of trial was served after the cause had been set for trial, "that no affidavit of merits, and no demand to change the place of trial of said cause, was delivered with said notice of motion, and no affidavit of merits, and no demand to change the place of trial of said cause has ever been served or filed in this case," and said notice of motion "is not based or predicated upon an affidavit of merits, or upon a demand to change the place of trial of said cause, as required by the provisions of the statute in such cases made and provided." Averments are also made that the convenience of witnesses requires that the cause be tried in Mono County.

It appeared that two similar cases were pending—numbered respectively 2083 and 2084—in both of which motions to change the place of trial were made and heard together. One of these cases was subsequently dismissed. The motions were heard April 14, 1916, and the court made the following order: "In each of these cases defendant city filed a motion for change of place of trial under section 394 of the Code of Civil Procedure, as amended in 1915. The motions were heard together under the stipulation that the one order made apply to both cases. It was and is the contention of the plaintiff that the court was without jurisdiction to hear or determine the motions by reason of the fact that there was no affidavit and demand filed at the time of first appearance. The contention is thus stated in general terms, perhaps inaccurately, for the reason that I do not consider it necessary to pass upon the motions from that viewpoint; I might say, how-

ever, as intimated at the time of argument, that if the motions were resisted upon that ground alone I would be disposed to grant the motions and transfer the causes. It is my opinion that the amendment itself is unconstitutional and void, and while plaintiff may have any advantage that may arise by reason of the lack of demand on first appearance still reserved, I reiterate that I do not consider the procedure contended for to be requisite herein. I cannot see where any lengthy opinion supporting my views would serve any purpose herein. The motions are denied."

The reasons given by the trial court for its decision are not binding upon the reviewing court. It was well said, in *City of Los Angeles v. Winans*, 13 Cal. App. 257, 265, [109 Pac. 650] : "It is the judicial action of the trial court as distinguished from its judicial reason which appellate courts are called upon to review." (*Luman v. Golden Ancient Channel M. Co.*, 140 Cal. 700, 704, [74 Pac. 307]; *Simon Newman Co. v. Lassing*, 141 Cal. 174, 175, [74 Pac. 761].)

The points urged by respondent in support of the decision, to which appellant addresses itself in its brief, are: 1. Section 394 of the Code of Civil Procedure is unconstitutional; 2. A motion for change of place of trial under section 394 must be made at the time defendant answers or demurs and must be accompanied by an affidavit of merits, and a written demand for such change, as required by section 396 of the Code of Civil Procedure.

Section 394, as enacted in 1872, provided that actions against counties may be commenced and tried in any county in the judicial district in which such county is situated, unless such action is between counties, in which case they "may be commenced and tried in any county not a party thereto." In 1881 the section was amended to read: "An action against a county, or city and county, may be commenced and tried in such county, or city and county, unless such action is brought by a county, or city and county, in which case it may be commenced and tried in any county, or city and county, not a party thereto." (Stats. 1881, p. 23.)

The amendment of 1901 need not be noticed, as the amended section was held unconstitutional "for want of re-enactment and publication at large of the revised law." The section was amended in 1907 and provided that "an action against a county may be commenced and tried in such county, unless

such action is brought by a county, in which case it may be commenced and tried in any county not a party thereto. Whenever an action is brought by a county or city against residents of another county or city, or a corporation doing business in the latter, the action must be, on the motion of the defendant, transferred for trial to a county, other than the plaintiff, if the plaintiff is a county, and other than that in which the plaintiff is situated, if the plaintiff is a city." (Stats. 1907, p. 700.) The section was again amended in 1915. The section now relates both to actions and proceedings, and includes counties, cities and counties, and cities. The earlier part of the section as amended in 1915 is substantially as the section was made to read by the amendment of 1907. The following provision was added: "Whenever an action or proceeding is brought against a county, city and county, or city, in any county, or city and county, other than the defendant, if the defendant is a county, or city and county, or, if the defendant is a city, other than that in which the defendant is situated, the action or proceeding must be, on motion of the said defendant, transferred for trial to a county, or city and county, other than that in which the plaintiff, or any of the plaintiffs, resides, or is doing business, or is situated, and other than the plaintiff county, or city and county, or county in which such plaintiff city is situated, and other than the defendant county, or city and county, or county in which such defendant city is situated. In any action or proceeding, the parties thereto may, by stipulation in writing, or made in open court, and entered in the minutes, agree upon any county, or city and county, for the place of trial thereof. This section shall apply to actions or proceedings now pending or hereafter brought." (Stats. 1915, p. 721.)

It was held in *Yuba County v. North American etc. Mining Co.*, 12 Cal. App. 223, [107 Pac. 139], that this section, as it read prior to the amendment of 1915, and after the amendment of 1907, was not violative of the constitution. In that case the defendant made a motion, under section 394, to change the place of trial. The court said: "The further point that section 394 is obnoxious to the provisions of the constitution prohibiting special legislation, 'regulating the practice of courts of justice,' and 'providing for changing the venue' of actions, because according privileges to corporations doing business without the county where the action is commenced

not accorded to corporations doing business within the county, is not, in our opinion, well taken. This discrimination is found in other sections where the right to have the place of trial changed is placed upon the distinct ground that the defendant resides in a county other than the county in which the action is commenced, and this although had the defendant been a resident of the latter county he could not have the venue changed. Such legislation has never been regarded as in any just sense special legislation within the meaning of the inhibitory provisions of the constitution." It is true there was in that case a demand made and an affidavit of merits filed, but that fact had nothing to do with the point involving the constitutionality of the section and the decision had the sanction of the supreme court.

The section applies equally to all counties, cities and counties, and cities in the state, and no one is given any advantage over another, and the section gives to parties to the suit other than the above mentioned the same right of transfer of the case as is accorded to counties, cities, and cities and counties.

In *Gridley v. Fellows*, 166 Cal. 765, 767, 768, [138 Pac. 355, 356], the constitutionality of section 395 of the Code of Civil Procedure was drawn in question on the grounds here urged against the validity of section 394. Said the court: "The provision of the amendment of section 395 in question, it is true, applies only to specified classes of cases. But it applies alike in every part of the state to all actions embraced in the classes described. Consequently it is not a local law. It cannot be deemed a special law forbidden by the constitution if it is addressed to a class of cases based on some natural, intrinsic, or constitutional distinction or difference, reasonable and substantial, between these actions and others not included and sufficient in some reasonable degree to account for or to justify the making of the different rule." (Citing the leading case of *Pasadena v. Stimson*, 91 Cal. 238, 251, [27 Pac. 604], and the latest enunciation of the rule, in *Ex parte Miller*, 162 Cal. 687, 698, [124 Pac. 427].) In the discussion of the question the court said: "The presumption is in favor of the legislative action. The court cannot decide that the classification is unjustifiable in reason, unless it can see that the presumption is overcome because no reason exists."

It must be clearly shown that the legislation attacked makes an improper discrimination by conferring particular privi-

leges upon a class of persons arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privilege granted, and between whom and the persons not so favored no reasonable distinction or substantial difference could be found justifying the inclusion of the one and the exclusion of the other from such privilege. (*Matter of Miller*, 162 Cal. 687, 698, [124 Pac. 427].)

We have seen that where a county is plaintiff, and a resident of or a corporation doing business in another county is defendant, the action or proceeding must be, on motion of defendant, transferred for trial to a county other than that of the plaintiff or defendant. (*Yuba City v. North American etc. M. Co.*, 12 Cal. App. 223, [107 Pac. 139].) The reasons urged against the constitutionality of the part of section 394 involved in that case were unavailing and should, we think, be so held in the present case. Cities, counties and cities, and counties are units of the state government, and we must assume that the legislature was of the mind, in passing the law, that where a city is sued in a county other than that in which it is situated, circumstances might arise such as in the judgment of the legislature should make it mandatory at defendant's request to transfer the case to a county other than that of plaintiff or defendant. Cities, counties and cities, and counties do not stand in the same relation toward each other and toward citizens generally, when considered in their governmental capacities, as citizens stand toward each other. We do not think it appears from the statute that an arbitrary selection has been made from among a large number of persons between whom and the persons favored (cities, counties and cities, and counties) there is no reasonable distinction or substantial difference justifying the inclusion of the one and exclusion of the other from such privilege. (*Matter of Miller*, 162 Cal. 687, 698, [124 Pac. 427].)

Whether the determination by the legislature that a general law can be made applicable is conclusive, was discussed in *People v. Mullender*, 132 Cal. 217, [64 Pac. 299], but not decided. It was, however, decided that a law cannot be held invalid merely because, in the opinion of the court, it would have been possible to frame a general law under which the purpose of the special law could have been accomplished. We find no justifiable reason for holding the section in question to be unconstitutional.

The contention of plaintiff is that in making its motion for a change of the place of trial the defendant was compelled to conform to the requirements of section 396 of the Code of Civil Procedure; that at the time defendant answered it should have filed an affidavit of merits, and should have demanded in writing "that the trial be had in the proper county." In its brief, plaintiff says: "Section 396 declares that when an action is not commenced in the proper county, that is to say, in the county of the defendant's residence, where it is a personal action, as provided in section 395, or in the county where the municipality is situate, as provided in section 394, then the defendant must, at the time he answers or demurs, file an affidavit of merits and demand, in writing, that the trial be had in the proper county."

Sections 396 and 397 read as follows:

"396. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county."

"397. The court may, on motion, change the place of trial in the following cases:

"1. When the county designated in the complaint is not the proper county;

"2. When there is reason to believe that an impartial trial cannot be had therein;

"3. When the convenience of witnesses and the ends of justice would be promoted by the change;

"4. When from any cause there is no judge of the court qualified to act."

Respondent's premise, to wit, that the county in which defendant is situated was the proper county in which the action should have been brought, is unsound. Mono County was the proper county, and the only county, in which the action could have been properly brought. (Code Civ. Proc., sec. 1243.) Not only so, but it was the proper county in which to try the case. Section 394 does not provide that the city defendant may have the place of trial changed to the county in which it is situated. Quite the contrary, the section provides that the action or proceeding must be transferred for trial to a county other than that in which it is situated. In

Cook v. Pendergast, 61 Cal. 72, the court had section 396 under discussion and particularly the question as to what is meant by the term "proper county." Stating that the section in effect provides that a defendant has waived his right to a change of the place of trial on the ground that the action has not been commenced in the proper county, unless, at the time he first appears by answer or demurrer, he files an affidavit of merits and demands in writing a transfer to the proper county, the court said: "The 'proper county' is the county in which actions are required to be tried, 'subject to the power of the court, to change the place of trial' by sections 392, 393, 394, and 395 of the Code of Civil Procedure. Section 396 has changed the rule, if it ever was a rule, which required the motion, or notice of motion, in *all cases* to precede or accompany the answer or demurrer. The prohibition of a motion on the ground that 'the county designated in the complaint is not the proper county,' except where the affidavit is filed and the written demand made when the answer or demurrer is filed, is itself a permission that a motion on any other statutory ground may be made by defendant, without the affidavit and demand, within a reasonable time after his appearance. Else why is the prerequisite made applicable to motions made upon the ground particularly mentioned?" We understand the court to have held that a demand for a change of the place of trial at the time of appearance, as also other requirements of section 396, do not apply where the motion is made on any ground other than that the action is not brought in the proper county for its trial. It was hence said in that case that a motion made on the ground that a fair and impartial trial could not be had might be made after answer, the court saying: "It has been held that nothing less than an actual experiment, by way of trial or attempt, to impanel a jury, and a consequential failure, will be sufficient to show that a fair and impartial trial cannot be had."

Pascoe v. Baker, 158 Cal. 232, [110 Pac. 815], was an action for damages for personal injuries, and was commenced in the city and county of San Francisco. Defendant appeared and demanded a transfer to the county of Los Angeles in which he resided. The motion was granted. Thereafter plaintiff moved to have the action retransferred to the city and county of San Francisco, basing his application on the

ground of convenience of witnesses. The court granted the motion, and defendant appealed. Plaintiff filed no affidavit of merits, and it was contended that the order was unauthorized for that reason. The court said: "But we are cited to no authority in support of appellant's claim that such affidavit is required. It is true that a defendant, asking a change on the ground that the county in which the action is commenced is not the proper county for the trial, must file an affidavit of merits. This is the express provision of section 396 of the Code of Civil Procedure. No such condition has, however, been imposed upon a party occupying the position of the respondent here."

In *Wadleigh v. Phelps*, 147 Cal. 541, [82 Pac. 200], the action was brought in Nevada County and the motion to change the place of trial was made on two grounds: 1. That defendant resided in San Mateo County; 2. On the ground of convenience of witnesses. No motion or demand was made until after defendant had appeared by demurrer. Upon the first ground it was held that defendant had waived his right by failure to make demand until after he had appeared. The court held as to the second ground that the counter-affidavits of plaintiff sufficiently controverted all the facts relating to the convenience of witnesses to justify the lower court in concluding that the convenience of witnesses would not be promoted by the proposed change. We think it fair to assume that the court considered the merits of the motion made upon the second ground, and in doing so must have held that the provisions of section 396 do not apply, except when the motion is made on the ground that the action is not brought in the proper county.

Respondent cites *Powell v. Sutro*, 80 Cal. 559, [22 Pac. 308], and *Bohn v. Bohn*, 164 Cal. 532, [129 Pac. 981]. In each of these cases the motion was made on the ground that the action was not commenced in the proper county, having been brought in a county other than defendant's residence. The question now here was not involved in those cases. Obviously the defendant in each of those cases was bound by the provisions of section 396. *Donohoe v. Wooster*, 163 Cal. 114, 117, [124 Pac. 730], was a similar case. It is cited also to the point that the right to change the place of trial must be determined by the conditions existing at the time of the appearance of the party demanding the change. Section 394,

however, expressly provides that it "shall apply to actions or proceedings now pending or hereafter brought."

The order is reversed with directions to grant defendant's motion.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 13, 1917.

[Civ. No. 1654. Third Appellate District.—May 16, 1917.]

VICTORIA ALDEN, Appellant, v. C. E. MAYFIELD, Respondent.

LANDLORD AND TENANT—REMOVAL OF GLASS AND MARBLE FRONT OF BUILDING—RIGHT OF TENANT.—In this action by a landlord against a tenant for damages in removing a plate glass and marble stone front from the demised premises, it is held that the evidence justifies the findings that the glass and marble were attached to the building at the defendant's own expense and were his property; that they were not so affixed as to constitute them integral parts of the premises; that they were removed without damage to the freehold or building; and that the building upon such removal was put in as good condition as it was at the time that the glass and marble were installed.

ID.—PLEADING—AMENDMENT OF ANSWER—DISCRETION.—In such an action where it was evident that from the very inception of the action, and particularly from the time of the filing of the answer, that it was the theory of the defendant that having put in the glass and marble front at his own expense, they constituted his property, and that he had the right to remove them on the termination of his lease, but such theory was not presented by the answer as originally filed, and that by reason thereof the defendant lost on appeal, it is an exercise of sound judicial discretion to grant the defendant on the second trial leave to amend his answer conformably to such theory.

APPEAL from a judgment of the Superior Court of Solano County, and from an order denying a new trial. A. J. Buckles and W. T. O'Donnell, Judges.

The facts are stated in the opinion of the court.

W. U. Goodman, for Appellant.

T. T. C. Gregory, and C. J. Goodell, for Respondent.

HART, J.—This appeal grows out of a second trial of this action. In the former trial, as in the second, the defendant prevailed, and an appeal was taken by the plaintiff to the supreme court from the judgment and the order denying him a new trial. The judgment and the order were reversed (*Alden v. Mayfield*, 163 Cal. 793, [Ann. Cas. 1914A, 258, 41 L. R. A. (N. S.) 1022, 127 Pac. 44]), and the nature of the action and the issues as presented and tried at the former trial are stated in the opinion in that case as follows:

“Plaintiff sued to recover damages for injury to her freehold, and for an injunction to restrain threatened future damages. The specific charge of damages was that the defendant ‘between midnight of the twenty-eighth day of May and daylight of the twenty-eighth day of May, wrongfully and unlawfully cut down, tore out, and removed the heavy plate glass and stone front of a brick building belonging to plaintiff and replaced the same with a cheap temporary structure with great damage to said property and the said plaintiff in the sum of \$1,000.’ Defendant admitted the taking down and removal of the plate glass and the marble stone front, but alleged that while tenant of the building he placed the plate glass and marble in the building; that the windows and marble were owned by him ‘and were placed there by him for the purpose of trade, ornament, and convenience only, and were trade fixtures and not an integral part of the said store or premises, and could be and were removed without any injury to the premises.’ The court found in accordance with this averment of the answer. It further found that defendant threatened to remove fixtures which were part of the freehold, and as a conclusion of law declared that plaintiff was entitled to an injunction restraining defendant from injuring the freehold; but by its judgment withheld the injunction and gave judgment for defendant for costs.”

In the opinion, it is said: “It is to be noted that the answer does not base the right of removal upon any agreement between the landlord and tenant, and the court does not find

that the removal was by virtue of any such agreement. Wherefore, all of respondent's argument based upon section 1013 of the Civil Code is meaningless. The pleadings and the findings are to the effect that the property removed was the tenant's property; was affixed to the freehold for the purpose of trade, ornament, and convenience and had not become an integral part of the store or premises. This is a finding under section 1019 of the Civil Code, which permits such removals under the indicated circumstances. The questions presented are, first, whether the plate glass and marbles so removed belonged to the defendant and whether, if they so belonged to the defendant, they were attached to the freehold in such manner as to justify his removal of them. That they were attached by screws is uncontradicted. That the plate-glass windows and the marble formed the front of the store occupied by defendant is equally without controversy. Their removal necessarily, and against any evidence to the contrary, was the removal not of a fixture but of a portion of the building itself—the very front of the store. By such removal the building itself ceased to be an inclosure and was open to intruders and the elements."

Upon the return of the cause to the court below for retrial, the defendant applied for and, over objection by the plaintiff, was granted leave to amend his answer by pleading an express oral agreement between him and the plaintiff, whereby it was stipulated and agreed that the defendant should put in the plate glass and the marble base in the front of the building at his own expense and that, upon quitting the premises, he might remove the same upon the condition that he would not injure the building, and would place the portion from which the glass and the marble were removed in equally as good condition as when the change indicated was made.

The court, as a result of the last trial, found that the agreement for the removal of the plate glass and the marble base, as pleaded in the amended answer, had been entered into between the parties. Conclusions of law were made and filed in accordance with the findings, and judgment thereupon entered against the plaintiff and in favor of the defendant for costs.

These appeals by the plaintiff are from the judgment and the order denying her a new trial.

It is obvious that the situation presented by this appeal is, in material and important particulars, entirely different from that presented herein on the former appeal. As is to be noted from the excerpt extracted and reproduced above from the opinion of the supreme court disposing of the former appeal, the question whether there was an agreement between the parties, whereby the defendant was to be allowed to remove from the front of the building the plate glass and the marble installed therein by him upon quitting the premises, was not made an issue by the pleadings, nor was there a finding thereon by the trial court. The amendment of the answer after the decision by the supreme court formally introducing that issue into the case, and the finding thereon that such an agreement had been made present, in a legal aspect, a much different case from that submitted to the supreme court on the first appeal.

In addition to the finding that an agreement was made authorizing the defendant, upon ceasing to occupy the building, to remove the plate glass and marble slabs from the front of the building, the court, as a result of the second trial, made the following findings, which appear to derive from the evidence sufficient support:

"It was stipulated by plaintiff and defendant, and is hereby found as a fact, that all the shelving, fixtures, and such appliances attached to and connected with the store and all staging, electric-light wiring, and gas-fittings, were, and are, the property of plaintiff, and that they could not be removed by defendant; the court finds that defendant has not threatened nor intended to, and will not, unless restrained by this court, or at all, cut out, tear down, or remove any of the shelving, fixtures, or appurtenances last hereinabove described, but has removed only such fixtures, as aforesaid, as by stipulation and agreement, he could remove"; that "it was further stipulated by plaintiff and defendant and now is found as a fact that the following articles were, and are, the property of the defendant, and might be removed by him: three glass hatcases, four glass showcases on the side, two center glass showcases, six glass sectional suit cabinets or cases, one counter, one running ladder, one stove, one cash register, one safe, two mirrors, and all other articles not attached to the building."

It will later be shown that the issue as to the injunctive relief prayed for by the plaintiff has become entirely immaterial, so far as these appeals are concerned, and, therefore, the determination of these appeals, save as to certain rulings on evidence and the order allowing the amendment to the answer, is narrowed down to and made to rest solely upon the solution of three propositions, viz.: 1. Whether an agreement to remove the glass and marble was made; 2. If so, were they removed in such manner as unnecessarily to injure or damage the building; 3. Was the building, or the front portion thereof from which the glass and the marble were removed, placed by the defendant in as good condition as it was prior to the installation of the plate glass and marble show-window?

The decision of these questions obviously depends upon the further proposition whether the evidence supports the findings that the agreement was made, that, in removing the glass and marble, the building was not injured or damaged, and that the front portion thereof, after the removal, was placed and left in as good condition as it was in before the new show-window was installed by the defendant.

It is proper to observe that the evidence disclosing the nature of the improvements which, under the agreement, were to be removed by the defendant, and their effect upon the building when installed, and the effect of their removal upon the building—that is, whether they were so attached thereto as that their removal would of itself impair or weaken the building—is, we judge from the opinion of the supreme court, entirely different from that which thus appears to have been shown by the record supporting the former appeal. For instance, the evidence, as it was incorporated into the record upon which the former appeal was submitted, apparently justified the conclusion that “the plate-glass windows and the marble formed the front of the store occupied by the defendant,” that “their removal necessarily, and against any evidence to the contrary, was the removal not of a fixture but of a portion of the building itself—the very front of the store,” and that “by such removal the building itself ceased to be an inclosure and was open to intruders and the elements.” (*Alden v. Mayfield*, 163 Cal. 793, 795, [Ann. Cas. 1914A, 258, 41 L. R. A. (N. S.) 1022, 127 Pac. 44].) At the trial from which the present appeals arise it is made to appear from

the testimony of both the defendant and the witness, Lund, a building contractor, who put in the plate-glass front and the marble slabs for the defendant, that the plate glass and the marble slabs removed from the building did not constitute the entire front of the store, nor their removal cause the building itself to cease to be an inclosure. The manner in which the plate glass and the marble base were installed was described by Lund as follows: "The plate glass set at the outer edge of the shoulder of the base; a little recess, about five-sixteenths of an inch, was left outside of the hardwood floor for this glass to set in. We always leave a little space at the top of half an inch, so in case of any settlement there is no danger of breaking the glass. The glass at the corner was held in place by a wooden bar on the inside, which was fastened neither to the ceiling nor to the base of the window, and metal bars on the outside were screwed into this wooden bar to form a clamp to secure them. The base of the glass was held in place by the marble, which projected above the base of the glass, say one-half or three-quarters of an inch and the marble in turn was secured by brass screws, through the marble, into the wooden base of the window. . . . The plate glass that I put in for Mr. Mayfield did not in any way tend to support or strengthen or hold together the window; nor did the marble slabs." This witness further testified that the molding was nailed to the building and cleats attached to the molding, and that the glass was slipped into and held by the cleats; that, in removing the glass, neither the molding nor the cleats were touched or disturbed, but the glass was merely withdrawn from the cleats.

The plaintiff testified that, when the plate glass and marble slabs were removed, the building was not thereby left open or exposed to the elements; that the whole front remained, and that "there were partitions, the windows still remained there, and the only way anyone could enter would be entering through the door." In this statement the plaintiff was corroborated by Lund.

In brief, and recapitulatory of the testimony of the plaintiff and Lund, the marble was used as a base for the support of the plate glass, and the latter was itself nowhere attached to the building, but was slipped into the cleats which had been fastened to the molding, so that it could be and was, as we have seen and shall later further see, removed from the cleats

without detaching the cleats or the molding or otherwise disturbing either or the building; that the plate glass and the marble did not form the front portion of the structure, and that when removed it did not destroy the inclosure of the building or otherwise expose it to the elements or intruders, the plaintiff testifying that entrance into the store, after the removal, could be effected only by means of the door. This, we say, is the testimony as it is presented by the record now before us relative to the manner in which the plate glass and the marble base were attached to the building; and, while it is true that the marble was secured by means of brass screws which were passed through it and into the wooden base of the window, yet the testimony adverted to very clearly shows that the show-window was so constructed as to admit of the ready and easy removal thereof without the slightest injury to the building, or the impairment of its stability as a structure in any degree.

As to the agreement for the removal of the plate glass and the marble, the testimony shows: That the plaintiff's son, Richard C. Haile (deceased at the time of the second trial), had the management and control of the building as the plaintiff's agent. He, in other words, was authorized by the plaintiff to attend to the renting of it, to make agreements and leases to that end, and to make such arrangements with tenants or persons employing the use of the building as might be necessary or required for the convenient use of the building for the purposes for which it might be let out. When the defendant leased the building the negotiations for that purpose were carried on with Haile. The defendant testified that he spoke to the plaintiff about making some changes and improvements in the store, and that she referred him to Haile, saying her son "had charge of it and whatever I did to do with him." The defendant then called on Haile, and the two entered into an agreement by which a number of improvements in the interior of the store were to be made, the defendant to pay for the same, and to withhold from the rent in reimbursement for the expenditure so made the sum of ten dollars each month until the total sum so expended—amounting in the aggregate to \$175—was repaid. Subsequently, the defendant again went to Haile and asked him to install the heavy plate glass and the marble base in the place of the front show-window as it then stood. Haile refused to pay for the improvement so

asked for, but proposed that the defendant proceed to put in the plate-glass windows and marble, and that the latter, when he vacated the store, "could take them out and remove them, provided I would replace them as the store originally was prior to the time when I took it out or in as good condition."

The court found that the removal of the plate glass and marble was by the defendant, on the twenty-eighth day of May, 1910, "effected and made without any damage whatsoever to said premises or said freehold or said building; that neither said glass nor said marble had by the manner in which they or either of them was affixed, or otherwise, become an integral part of the premises or freehold or building nor were said glass and marble an integral part thereof; that said glass and marble were affixed to said building by means of lag screws."

Testimony showing how the glass and marble were attached to the building has already been referred to herein, and, as further supporting the above finding, testimony disclosing the following additional facts should be considered: That there were only four slabs of marble and as many pieces of plate glass removed, leaving the remainder of the front intact; that neither the plate glass nor marble was used for or acted as a support for the store above or any part of the building; that, as a matter of fact, "the plates would surely break if there was any weight on them"; that it required only thirty or forty minutes to remove them, and that immediately upon their removal they were replaced with plain glass and a wooden base even superior in quality to those in the front of the building before the plate glass and the marble were substituted therefor; that, in removing them, it was only necessary to slip the plate from the cleats by which they were held and to remove the screws securing the marble base; that, by their removal, the brick or other materials of which the building was constructed were not disturbed or damaged in any degree, and that the building itself remained as stable and strong as it ever was.

The testimony addressed to the vital issues involved in the controversy, as they were formally tendered and accepted at the later trial thereof, has now been briefly summarized, and from the testimony as so presented it is plainly manifest that as the case was presented at the second trial thereof, and as it

is here now presented, the defendant, both in the matter of pleading and in that of proof, relied and relies upon the provisions of section 1013 and not, as the situation necessitated upon the former trial, upon those of section 1019 of the Civil Code. The first-mentioned section, it should be explained, in effect provides that, where an agreement is so made between the landlord and tenant, the latter may remove property or a thing affixed by him to the land of the former. The section next named provides that, at any time during the continuance of his term, a tenant may remove from the demised premises anything affixed thereto by him for the purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part thereof.

And it seems to us that, from the testimony, of which the above is a conspectus, the conclusion is irresistible that, upon the theory upon which the cause was last presented and tried, there is, as before in effect declared, ample justification for the trial court's deductions therefrom, as evidenced by its findings, viz.: That the plate glass and the marble slabs removed by the defendant were attached to the building at his own expense and that they were his property; 2. That they were not so affixed to the premises as to constitute them integral parts thereof, but were attached thereto in such manner "as to justify his removal of them"—that is to say, in such manner as that they could be removed without injury or damage to the freehold or the building to which they were directly attached; 3. That they were removed without producing any injury or damage to the freehold or the building; and, 4. That the building upon such removal was put by the defendant in as good, if not a better, condition in that respect than it was in prior to and at the time of the installation of the plate glass and the marble front or show-window.

It results, of course, that the findings, being sufficiently sustained by the proofs, afford full support to the judgment.

The claim that the court should have granted the preliminary or other preventive relief asked for by the plaintiff is of little importance, even if, under the allegations of the complaint, the plaintiff was preliminarily entitled to such ancillary aid. The complaint, in furtherance of its plea for an injunction, alleged that the defendant had threatened and was

about to remove from the store certain fixtures which belonged to the plaintiff. The court found, upon sufficient evidence, that certain fixtures, portable in character, such as hat-racks, showcases, and other like store appliances, which were not affixed to the building in a legal sense, were the property of the plaintiff. If the object of the injunction was to restrain the defendant from removing these, the failure to grant that remedy is, so far as such fixtures were concerned, now unimportant and without prejudice, since, as shown, it was found that they belong to the defendant. As to the other fixtures, apart from the plate glass and marble slabs, the court found, as will be noticed from the findings above quoted herein, that the parties had stipulated that they were the property of the plaintiff. This finding is supported by evidence, and, obviously, favorable to the plaintiff. The evidence shows that these particular fixtures were never interfered with or disturbed by the defendant, nor was there any attempt on his part to remove them. Therefore, so far as said fixtures were concerned, whether the court did or did not err in refusing to grant a preliminary injunction, is now entirely without any significance or importance; and, under the finding and the stipulation referred to, it was obviously unnecessary to grant permanent injunctive relief as to said fixtures.

Of course, it will not be claimed that the prayer for an injunction was aimed at interference with or the removal of the plate glass and marble slabs, since the evidence shows, and, indeed, the complaint alleges, that those articles had already been removed when this action was instituted, and since, as clearly appears from the complaint, the injunctive relief asked for was solely and exclusively prohibitive, and not mandatory in its nature.

We do not think, as the plaintiff contends, that the court abused its discretion in allowing the defendant to amend his answer in the particular and manner indicated in the outset of this opinion. It is evident that, from the very inception of this action, particularly from the time of the filing of the answer, the theory of the defendant was that, having himself and at his own expense put in the plate glass and the marble slabs, they constituted his property, and that he would legally be entitled and authorized to remove them upon the termination of his term as lessee of the premises. But it transpired,

as we have shown, that this theory was not presented by the answer as originally filed, nor did the court at the first trial make a finding in consonance therewith, and thus the defendant lost on appeal. In view of the situation as thus indicated, and in the interest of justice, the order granting leave to the defendant so to amend his pleading as to enable him legally to make out his case on the proofs conformably to the only theory upon which he could hope to prevail—the theory upon which he had evidently supposed he had properly proceeded in the first instance—constituted only the exercise of a sound judicial discretion.

We have examined in detail and with much care the rulings by which, so it is claimed, improper testimony was permitted to enter the record, and have found in none of them any just ground for holding that, even if technically erroneous, they, in any measure, affected the substantial rights of the plaintiff at the trial of the case.

The judgment and the order appealed from are affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 13, 1917.

[Civ. No. 2062. First Appellate District.—May 17, 1917.]

CHARLES WRIGHT, Respondent, v. LOCOMOBILE COMPANY OF AMERICA (a Corporation), Appellant.

APPEAL—CONTRACT FOR LAYING FLOOR IN BUILDING—SUBSTANTIAL COMPLIANCE—AFFIRMANCE OF JUDGMENT.—Upon an appeal from a judgment and order denying a new trial in an action upon a contract for the laying of a floor of a specified description in a building, where the main question relied upon for a reversal is as to whether or not there was a substantial compliance with the terms of the contract, and the appellant challenges the sufficiency of the evidence to support the finding of the trial court to that effect, the appellate court will not undertake to review or reverse the decision, where it is shown by the record that the judge of the

trial court, after hearing the testimony, visited the building and examined the floor itself, and then decided that there had been a substantial compliance with the contract.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Elliott McAllister, and H. S. Young, for Appellant.

Jacob Samuels, for Respondent.

THE COURT.—Action upon a contract for the laying of a floor of a specified description in a building. Plaintiff recovered judgment, from which defendant appeals, as also from an order denying its motion for a new trial.

The main question relied upon for a reversal of the judgment and order is as to whether or not there was a substantial compliance with the terms of the contract, and the appellant is challenging the sufficiency of the evidence to support the finding of the trial court to that effect. The judge of the court below, after hearing all of the evidence and going into all of the technical facts in relation to the different classes of floor, visited the building and examined the floor itself. It seems to the court, upon an examination of the entire record, that this is a case where there is a substantial conflict in the evidence, and that particularly is true where the judge of the court, after hearing the testimony of the respective contractors and experts, went and examined the premises himself, saw the floor, and then decided that there had been a substantial compliance with the terms of the contract. Under those circumstances we will not undertake to review or reverse the decision of the trial court, and for the reasons stated the judgment and order are affirmed.

[Civ. No. 2059. First Appellate District.—May 17, 1917.]

CITY PROPERTIES COMPANY (a Corporation), Appellant, v. F. E. MEACHAM, Respondent.

JUDGMENT BY DEFAULT—PREMATURE ENTRY—SUBSEQUENT MOTION TO ENTER DEFAULT—PENDENCY OF MOTION TO VACATE—ENTRY OF DEFAULT PROPERLY REFUSED.—A default entered by the clerk upon the expiration of ten days from the time of service of an amended complaint, but within less than ten days from the time of filing of such amended complaint, is irregular; and a motion made after the expiration of ten days from the time of the filing of such complaint to enter the default, is properly denied, where at the time such motion was made there was pending a motion to set aside the default.

ID.—INADVERTENT ENTRY OF JUDGMENT—APPEAL—POWER OF TRIAL COURT TO VACATE.—Where the clerk of the court inadvertently enters findings delivered to him for the judge, as the judgment of the court, without the judge having seen or examined them, the court has power to set aside the judgment, although an appeal had been taken therefrom.

APPEALS from an order of the Superior Court of the City and County of San Francisco denying a motion to enter a default, from a purported judgment entered by the clerk and subsequently set aside by the court, and from an order setting aside said purported judgment. Marcel E. Cerf and E. P. Shortall, Judges.

The facts are stated in the opinion of the court.

Arthur Crane, for Appellant.

Chas. H. Sooy, and Courtney L. Moore, for Respondent.

KERRIGAN, J.—In this action the plaintiff takes three appeals—one from an order denying his motion to enter the default of the defendant; another from a purported judgment entered by the clerk and subsequently set aside by the court, and the third from the order setting said purported judgment aside.

As to the first of these appeals it appears that the plaintiff served upon the defendant an amended complaint, and at the

expiration of ten days thereafter, no answer having been served or filed, caused the clerk to enter the defendant's default. The plaintiff, however, did not file said amended complaint so served upon defendant until some eight days after said service, so that at the time of the entry of defendant's default by the clerk his time to answer had not expired—the service not being complete until the filing of the paper (*Coker v. Superior Court*, 58 Cal. 177, 178; *Billings v. Palmer*, 2 Cal. App. 432 [83 Pac. 1077]). The defendant moved to set this default aside. Pending this motion, more than ten days after the filing of said amended complaint having elapsed, the plaintiff moved the court to enter the default of the defendant. These motions came on for hearing together, and the court granted the motion of defendant, and denied that of the plaintiff; and it is this latter order that the plaintiff asks to have reviewed as an incident to his appeal from the judgment.

We think it clear that this order of the trial court was correct. Pending his motion to set aside the default, which the plaintiff had irregularly caused to be entered against him, the defendant was not required to file his answer; and indeed the clerk would have been justified in refusing to file it if tendered, in view of the state of the record which disclosed that the defendant's default had been entered.

As to the purported appeal from the judgment and the order setting it aside, it appears that at the conclusion of the trial judgment was ordered entered in defendant's favor. Thereafter the defendant prepared findings—they not having been waived—and delivered them to the clerk of the court for submission to the judge; but the clerk inadvertently entered them as the judgment of the court without the judge of the court having seen or examined them. Upon motion of the plaintiff timely made, this judgment so entered was by the court vacated.

It being apparent that the judgment was entered by the clerk of the court through inadvertence, there is no doubt of the power of the court, under such circumstances, to correct the record of the court's proceedings and to make it speak the truth. The contention of the appellant, therefore, that by the taking of its appeal from the judgment so inadvertently entered the court lost jurisdiction to take any further action cannot be sustained. The court acted wholly within its authority

in purging its records of the judgment entered under the circumstances described.

It follows from what we have said that the appeal from the purported judgment—in which it is also sought to have reviewed the order of the court refusing to enter the defendant's default—must be dismissed; and that the order setting aside and vacating said judgment must be affirmed. It is so ordered.

Richards, J., and Beasley, J., *pro tem.*, concurred.

[Civ. No. 1853. Second Appellate District.—May 17, 1917.]

CONSOLIDATED LUMBER COMPANY (a Corporation), Respondent, v. CITY OF LOS ANGELES (a Municipal Corporation), Appellant.

CONTRACT — LIQUIDATED DAMAGES — DECLARATION IN INSTRUMENT.—A declaration in a contract that the actual damages to be suffered from a breach would be difficult to ascertain, and that the parties were making provision for liquidated damages in lieu of actual damages, tends strongly to establish the fact required by the statute to exist, and tends to control the question as to whether the provision is one for liquidated damages or for a penalty, where the contract appears upon its face to be one allowed by the terms of section 1671 of the Civil Code.

ID.—CONTRACT FOR PURCHASE OF LUMBER—DAMAGES FOR DELAY IN DELIVERY—DECLARATION IN CONTRACT CONCLUSIVE.—In a contract for the purchase of a large quantity of lumber to be used in the construction of a municipal wharf, providing that the city might deduct from the contract price the sum of fifty dollars per day for each day that delivery was delayed, a declaration in the contract that the actual damages to be suffered from such a delay would be difficult of ascertainment, and that the parties were making provision therein for liquidated damages, tends strongly to establish the fact of the impracticability or extreme difficulty of fixing the actual damages, and such declaration is controlling, in the absence of evidence negating the declaration.

APPEAL from a judgment of the Superior Court of Los Angeles County. W. H. Thomas, Judge presiding.

The facts are stated in the opinion of the court.

Albert Lee Stephens, City Attorney, and Charles S. Burnell, Assistant City Attorney, for Appellant.

Frank D. McClure, for Respondent.

WORKS, J., *pro tem.*—This is an appeal from the judgment, and upon the judgment-roll alone.

The respondent contracted to furnish to the appellant a large amount of lumber to be used in the construction of a municipal wharf. The agreement provided, as shown by the findings, that the city might deduct from the contract price the sum of fifty dollars for each day that delivery of the lumber was delayed beyond the contract time. It also provided that "said sum of fifty dollars per day, in view of the difficulty in estimating such damage, is hereby agreed upon, fixed, and determined by the parties hereto as the liquidated damages that the city will suffer by reason of such default, and not by way of penalty."

The Lumber Company was twenty-seven days beyond the allotted time in completing delivery, and the city withheld the sum of \$1,350 in settlement of the amount due. Respondent then brought this suit to recover the amount thus unpaid and judgment was rendered in its favor. The theory of the trial court, in awarding the judgment, is indicated by the following statement erroneously incorporated in the findings of fact: "The court finds that that portion of the specifications which was made a part of the contract above set out fixing damages at \$50.00 per day, is void, and of no effect whatever."

Section 1671 of the Civil Code provides: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Section 1670 of the same code is to the effect that contracts fixing the amount of damages in anticipation of the event, except such as are allowed under section 1671, are void. Whether "it would be impracticable or extremely difficult to fix the actual damage" in a case in which the parties have attempted to agree upon liquidated damages in advance, is a question of fact. It will be noted that the specific declaration

is made in the contract here in question that the actual damages to be suffered from a breach would be difficult to ascertain, and that the parties are making provision for liquidated damages in lieu of actual damages. The decided cases in this state are uniformly to the effect that such a declaration tends strongly to establish the fact required by the statute to exist; and, further, tends to control the question as to whether the provision is one for liquidated damages or for a penalty, where the contract appears upon its face to be one allowed by the terms of section 1671. (*Potter v. Ahrens*, 110 Cal. 674, [43 Pac. 388]. See, also, *Muldoon v. Lynch*, 66 Cal. 536, [6 Pac. 417]; *Pogue v. Kaweah Power & Water Co.*, 138 Cal. 664, [72 Pac. 144]; *Nakagawa v. Okamoto*, 164 Cal. 718, [130 Pac. 707].) There is nothing in the findings to negative the statement in the contract that the actual damages for a delay in delivery of the lumber would have been difficult of ascertainment. That declaration is therefore conclusive.

The answer alleges that the defendant was damaged by the delay in delivering the lumber, "but that it would be exceedingly difficult, if not impossible, to estimate the amount of such damage." There was no finding of fact upon this latter allegation. The allegation amounted to nothing in its alternative and negative statement as to the impossibility, but tendered only an issue as to the difficulty, of estimating the amount of the damage. Therefore, the finding of the trial court that the damage "could have been ascertained, and that it is untrue that the same could not be ascertained," was not responsive to the pleadings.

The judgment is reversed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1667. Third Appellate District.—May 17, 1917.]

ELNORA L. SELLARS, Respondent, *v.* SOUTHERN PACIFIC COMPANY (a Corporation), et al., Appellants.

RAILROAD CORPORATION—DUTY OF COMPANY AND PASSENGERS—DEGREE OF CARE REQUIRED.—A railroad company is required to exercise an extraordinary and unusual degree of care as to its passengers while in transit, but as to passengers not actually in transit but on the railroad premises or property, the railroad is relieved of the extraordinary degree of care required of it toward passengers in transit, and the passengers are relieved of the extraordinary degree of care required of persons not bearing such relation to the railroad company; and the measure of duty in such case of the railroad company toward the passenger, and of the passenger toward the railroad company, is that each should exercise ordinary care.

Id.—INJURY TO RAILROAD PASSENGER—FALL IN ATTEMPTING TO REBOARD TRAIN AT EATING-STATION—LACK OF ORDINARY CARE—QUESTION FOR JURY.—In an action for injuries received by a passenger on a railroad train while in the act of going upon the platform of her car after having left the same for the purpose of procuring a meal at one of the company's eating-stations, the question whether the defendant failed to exercise ordinary care in not providing a porter to assist persons in leaving and returning to the car, and in not providing a stool or other contrivance to break the distance from the steps of the car to the ground, was properly submitted to the jury.

Id.—ARGUMENTATIVE INSTRUCTION.—An instruction that a railroad company cannot be expected to treat its passengers as children, or to put them under restraint, is properly refused, as it is misleading, obscure, and commonplace.

APPEAL from a judgment of the Superior Court of Kern County, and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Borton & Theile, for Appellants.

Kaye & Siemon, for Respondent.

BURNETT, J.—The action is for damages caused by the negligent failure of the Railroad Company to provide safe

and proper means of ingress and egress to and from the train on which plaintiff was a passenger, and the Southern Pacific Company is really the only defendant in interest. The plaintiff, who was a somewhat elderly lady of over sixty, bought a ticket from Los Angeles to Exeter, Tulare County, over the railway operated by said company. The train arrived at Bakersfield, an intermediate point and eating-station, at about 6 o'clock the following morning. An announcement for breakfast had been made by the company and plaintiff, with other passengers, left the train for that purpose. The eating-room at the station was crowded, however, and plaintiff, without getting breakfast, returned to her car. It was a long train, and when the stop was made, the car in which plaintiff had been riding did not reach the platform, but stood down in the switch-yard quite a distance from the depot at a point where the rails of a switch extended outward from the main track and over the course plaintiff was required to pass in leaving and entering her car. There was quite a frost that morning which may have contributed somewhat to the accident. The rails of the switch extended several inches above the ground, and no porter or other person was present to assist plaintiff in leaving or returning to the car, nor was there provided for passengers any stool or other contrivance to break the distance from the steps of the car to the ground. In attempting to board the car plaintiff fell heavily to the ground and sustained serious injuries, for which a jury held the Railroad Company liable and awarded her substantial damages. Plaintiff's account of the accident is as clear as could be expected under the circumstances, and we may quote from her testimony as follows: "There was no platform at the place where I got on the car, nothing but switch rails coming in, converging just where I went to step up. I raised my hand to catch hold of the rails but my left foot slipped on that rail—I remember that very distinctly—it was frosted. The rails seemed to stick up too far. I should think they were eight or ten inches above the ground. Just as I was raising up, putting my hand up to catch hold of the rail or handle on the car, this left foot slipped and dumped me down this way almost under the train, and my arm doubled right under, broke straight off, and the bones went down in that ground." In her cross-examination she related the details a little differently, as follows: "I was just reaching up to catch hold of the

rail. I think I caught my heel under the rail, I was not standing on the rail, I was walking along. I was just reaching my hand up and taking a step when I stumbled. This must have been the last step. I think my right foot was on the ground and I was taking a step with my left foot. I had not lifted my right foot up. It was my left foot which caught. I don't know whether I slipped or stumbled. I noticed the frost particularly. I think I stumbled against the first rail of the switch and fell right down in the dirt just over that one rail. The only way I can tell the distance from the rail over which I stumbled is this—I was standing on my right foot, and stepping with my left foot, and there would have been one additional step with the right foot before I got on the platform. I didn't intend to step on the rail. I noticed the rail. My purpose was to step over the rail. I don't know whether the heel of my shoe caught or slipped."

From these statements it is argued by appellant that the accident occurred before she reached the car. Hence, it is contended that the absence of a porter or of a stool must be eliminated from consideration as in no wise connected with the injury, and that the failure to have the car contiguous to the platform is of no vital importance, since her fall was clearly due to her own negligence. Such would be the only reasonable conclusion, probably, if the accident occurred while she was crossing the yard and before attempting to board the train. We are not justified, however, in adopting this theory of the facts. Even if there were material inconsistencies between her testimony on direct and on cross-examination, the jury might accept the statements made during the course of the former and reject those of the latter. This follows, of course, from the familiar responsibility and duty as to the evidence imposed upon the jury by the law. Moreover, there is no irreconcilable conflict in her statements. As to the few minor details wherein an apparent discrepancy exists, her testimony is not at all surprising, nor does this circumstance discredit her veracity as a witness. It is quite probable she did not know whether her foot was actually upon the rail, or whether she stumbled or slipped, or just how far she was from the steps of the car when the accident occurred. If she had pretended to know these things and had attempted to state them decisively, there would be greater reason for distrusting

her than appears in the record. It is true, though, that she states positively, both in the direct and in the cross-examination, that she "was just reaching my hand up" to take hold of the rail, when she slipped and fell. Indeed, accepting her as a credible witness, which the law requires of us in view of the finding of the jury, we necessarily conclude that she was in the *act* of going upon the platform of the car and was necessarily very near the steps. As to whether she stumbled or slipped it is probably of no great importance. She may have stepped upon the rail of the switch in order to reach the lowest step of the car and slipped off in consequence of the frost, or she may have stumbled over said rail as she was reaching forward, but, at any rate, it is quite probable, if not almost certain, that she would not have so fallen if there had been a platform or stool next to the car, or if a porter had been present to render assistance in her efforts to re-enter the car.

This naturally suggests the consideration as to the duty of the Railroad Company in providing for such contingency. Out of the situation also comes the inquiry whether the care exacted by the law is that known as *reasonable* or the *highest degree* of diligence. Respondent contends that at the time of the accident the relation of carrier and passenger existed, and therefore the same care was required as though she had been seated in the car. She cites many authorities to the point that "a passenger leaving the train for temporary and proper purposes, such as exercise, refreshment, or relief from the fatigue of travel while the train is stopping, continues to be a passenger during such absence from the train." Of course, he is still a passenger, but it does not necessarily follow that he is entitled to the same degree of care as while on the train. There are some decisions, however, so holding, among them being *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368, [20 L. R. A. 729, 33 Pac. 108], wherein, after referring to the general rule as to utmost care required of a railroad company as to its passengers, it was said: "The same duty is imposed upon the company toward a passenger while, on a continuous journey, he is going to and returning from the eating-stations provided by the company for the accommodation of passengers."

The doctrine of other cases to the contrary is summed up in the following quotation from 6 Cyc. 605: "A passenger by railroad is entitled to protection against danger, at the station-house or waiting-room, on the platform and in getting upon or alighting from the train, but the peculiar hazard of railway travel, requiring high speed by the use of the dangerous agency of steam, is not involved on the premises of the railroad company, or while getting on or off the trains, and therefore in these respects the care required for the protection of the passenger is reasonable, rather than the highest or extraordinary care."

However, the question is rather of academic than of practical importance here, and we need not concern ourselves about the peculiar terminology to be employed. It is at least clear that, generally speaking, there is a difference in the danger involved, and the opportunity and capacity to protect himself, between the situation of the passenger while traveling on the train and the other situations mentioned, and we think the authorities generally recognize the rule in cases like this to be that the carrier is held to "ordinary care and ordinary prudence."

A case involving the same principle as this, although different in its facts, decided by this court, is *Teale v. Southern Pacific Co.*, 20 Cal. App. 570, [129 Pac. 949], wherein the duty of a common carrier to a passenger alighting from the train was carefully considered and the decision is of interest here. We need not quote from it or from other decisions, but we think appellant is close to the mark in the affirmation of these principles: "1. A railroad track is a known place of danger and persons going uninvited upon the track or railroad premises must exercise an extraordinary degree of care. 2. As to its passengers while in transit, a railroad is operating a powerful and dangerous agency and must exercise an extraordinary and unusual degree of care. 3. As to the passengers of the railroad company not actually in transit but on the railroad premises or property, the railroad is relieved of the extraordinary degree of care required of it toward passengers in transit and the passengers are relieved of the extraordinary degree of care required of persons not bearing such relation to the railroad company, and the measure of duty in such case of the railroad company toward the passenger and of the pas-

senger toward the railroad company is the ordinary and usual one, viz., that each should be in the exercise of ordinary care."

Thus expressing our opinion, we are but following the view of the lower court as to these abstract principles, and we may go a step further in the declaration that whether the failure of the company in the respects already indicated was and is sufficient to constitute the want of ordinary care involved a question of reasonable controversy, and it was therefore properly submitted to the jury for determination. It has become almost a commonplace of the law that the question of negligence is seldom "so clear from doubt that the jury cannot fairly and honestly find for the plaintiff," and that "it is not the duty of the court in such cases, any more than in any other, to usurp the province of the jury and pass upon the facts." (*Jamison v. San Jose etc. R. R. Co.*, 55 Cal. 593.)

As to the duty of a railroad company to take every reasonable precaution for the safety and comfort of its passengers in alighting from and boarding its cars, of course, there is no controversy. Nor can there be much doubt that this general rule leads to the obligation to furnish platforms or stools or assistants at main stations like the one at Bakersfield. Where there is a platform it may be said also that it is the duty of the company to make it available for the passengers or, if not, to furnish one of the other suggested aids. At least, it is not unreasonable to say that its failure in these respects may constitute negligence and form the basis of an action for damages. Many cases are cited to illustrate the principle, to some of which we may briefly refer.

In *Peniston v. Chicago etc. R. Co.*, 34 La. Ann. 777, [44 Am. Rep. 444], the plaintiff sustained injuries while returning to the train after alighting for his meal. The railroad company was held to be negligent by reason of its failure to furnish sufficient light for the safety of the passengers. Therein the general principle is declared that "railway companies are under the legal obligation to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches, etc."

In *Memphis & Charleston R. R. Co. v. Whitfield*, 44 Miss. 466, [7 Am. Rep. 699], defendant's train of cars, on which plaintiff was a passenger, having reached the station at which plaintiff was to alight, passed several hundred yards beyond the depot, stopping at an unusual place, where it was low and

icy. Plaintiff demanded of the conductor that the train should be backed, which was refused. In attempting to alight, plaintiff dislocated his knee. Defendant was held to be chargeable with negligence.

In *Delamatyr v. Milwaukee & Prairie du Chien R. R. Co.*, 24 Wis. 578, the steps attached to the platform of the car had not been drawn up properly so that plaintiff could not reach the station platform by stepping down in the usual manner, but was obliged to jump some distance and was injured. In holding the railroad company guilty of negligence, the court said: "Of course, it is the duty of the company to afford passengers reasonable facilities for alighting from the cars, both by reasonably safe platforms and by stopping the train in such a manner that they may avail themselves of it without unnecessary exposure."

In *Cincinnati N. O. & T. P. Ry. Co. v. Bell* (Ky.), 74 S. W. 700, a passenger, on reaching her destination, attempted to step from the platform of the car to the ground and she fell, spraining her ankle. The lower step of the car platform was twenty-three inches above the level of the station platform. It was held that it was negligence for the railroad company not to have a stool for the use of the passenger or a porter to assist her in alighting.

In the Teale case, *supra*, the alleged negligence consisted in the failure to have a sufficient light at the station to aid the passenger in getting off the train in safety. The duty of the railroad company to furnish such light at their stations in order to promote the safety of the passengers was strongly emphasized.

To these and other authorities the present case is analogous, and we may add that the general practice to furnish platforms and also stools and porters for such trains is a significant recognition of the duty of the railroad company in that regard, and an implied characterization of their omission as negligence on the part of the carrier.

We think it equally apparent that the question of contributory negligence was properly submitted to the jury, and that their finding adverse to appellant cannot be said to be unsustained. This consideration lies, manifestly, close to the other. If the first be debatable so must be the second. We cannot hold that plaintiff was at fault in attempting to board the car as she did. We cannot say that she was reck-

less or indifferent to her own safety, or that she attempted in an unusual or reprehensible manner to re-enter the train. She was not required to enter another car adjacent to the platform, and then pass from that to the one in which she was traveling. If she had been advised to do so a different question might be presented.

In the determination of this issue as to her want of due care it was proper, of course, for the jury to take into consideration the age and sex of the plaintiff, as well as the surrounding facts and circumstances. In view of the whole case, we are satisfied that there was ground for the conclusion that she exercised ordinary care, and that it cannot be held as a matter of law that she was guilty of contributory negligence.

The case of *Falls v. San Francisco and North Pacific R. R. Co.*, 97 Cal. 114, [31 Pac. 901], cited by appellant, is not controlling here. That was decided upon the proposition that the railroad company was not properly chargeable with negligence in using the same platform for the depositing of freight, and for the accommodation of passengers, at a flag-station established for the convenience of a sparsely settled district wherein was made allowance of sufficient room for passengers. Therein the court followed *Cincinnati etc. R. R. Co. v. Peters*, 80 Ind. 172, in which it was declared that "At a mere way or flag station, where trains do not regularly stop for the reception and discharge of passengers and only stop when they are flagged, or to discharge a special passenger, a passenger need not expect or rely upon the company's having furnished a platform or other convenient place for the reception and discharge of passengers."

Appellant complains of the ruling of the court in sustaining an objection to each of these two questions asked of Charles L. Jones, an employee of appellant, who had been yardmaster for nine years: "During that period of time how many accidents have you known of having been caused by slippery or frosty rails?" and "During this period of time how many accidents, if any, have you heard of or known of by people stumbling over rails?" In support of its contention, appellant cites section 446 et seq., volume 1, of Wigmore on Evidence. The learned author cites instances wherein similar evidence was presented to different courts, although, as admitted by appellant, "Most of such authorities, however, are

instances where other previous accidents are admitted, rather than the lack of other previous accidents." But, conceding that there is no difference in principle, between the admissibility of such positive and negative evidence, it is sufficient to say that before such testimony can be introduced it should be shown, or an offer made to show, that the conditions were similar. (Wigmore on Evidence, sec. 442.) This was not done and the ruling was therefore not erroneous. Moreover, if it should be granted that the court committed error, it was not grave enough to justify a reversal. If the witness had testified that he had never known of a similar accident before, it would not, in all human probability, have affected the verdict of the jury, nor would it change the legal aspect of the case here.

There was no error in refusing the following instruction: "A railroad company cannot be expected to treat its passengers as children, or to put them under restraint. Passengers must take the responsibility of informing themselves concerning the every day incidents of railway traveling, and the company could do business upon no other basis." Many objections could be made to it. It is sufficient to say that it is argumentative, obscure, and commonplace.

Another instruction, based upon the Falls case, *supra*, was refused. It endeavored to expound the legal doctrine as to the liability of the carrier to one who by express invitation or otherwise has come upon the carrier's premises for the purpose of transacting business. It was misleading, argumentative, and inapplicable. As far as the rule of reasonable care therein set forth is concerned, it was amply covered by other instructions. It will be sufficient to quote the following, given on request of defendant: "There is no extraordinary or unusual degree of care imposed upon a railroad company in keeping up its stations and station grounds so far as concerns the rights of persons not actually being carried at the time on its trains. The burden that rested upon defendants in the case at bar, in the care of their stations and station grounds, was merely that they should use ordinary care. The plaintiff was obligated to the same duty to avoid the accident, namely, that he should use ordinary care."

The complaint as to certain instructions which were given is also without merit. They were as favorable to defendant as the law permitted. They were within the issues and ap-

plicable to the evidence. Indeed, there seems no ground for just criticism as to the action of the court in any respect.

The judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 16, 1917.

[Civ. No. 2045. First Appellate District.—May 18, 1917.]

GEORGE ELWYN WILLATS et al., Respondents, v. PAUL H. BOSWORTH, Appellant.

CONSTRUCTIVE TRUST—CONVEYANCE OF REAL PROPERTY—ORAL PROMISE TO HOLD IN TRUST.—Where a person being on her deathbed and desiring that her property should be devoted to the maintenance and support of her grandchildren, and having the fullest confidence in the integrity of her son, executes and delivers to him a deed absolute in form to the property upon his oral agreement that he would hold the property in trust for the benefit of such grandchildren, and for the purposes specifically to be set forth in a declaration of trust to be thereafter prepared and signed by him, a constructive trust is created in favor of such grandchildren.

Id.—DECLARATION OF TRUST—DEFINITENESS AS TO TERMS.—A written declaration of trust drawn by the trustee himself, is not void for indefiniteness, where the fact that it is intended to be such a declaration clearly appears, the beneficiaries named, the property described, the duties of the trustee in collection of rents and care of property defined, and the distribution of the proceeds of the property in event of its sale provided for.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

McClellan & McClellan, for Appellant.

William F. Herron, for Respondents.

RICHARDS, J.—This is an action brought to establish a trust in real estate, and to remove the trustee for alleged violations of the terms and duties of his trust. The answer of the defendants admitted the substantial facts attending the creation of the trust, but upon the trial of the cause, and upon this appeal, the defendants there and the appellant here deny the sufficiency of those facts to accomplish the creation of a trust, and assert absolute ownership of the premises in question in the defendant Paul H. Bosworth. The trial court found in favor of the plaintiffs and entered its judgment establishing the trust and removing said Paul H. Bosworth as trustee thereof for culpable misconduct in the management of the trust, and appointing another trustee, and directing the execution of a deed to the premises covered by the trust on the part of said Bosworth to the new trustee. From such judgment the defendant Paul H. Bosworth prosecutes this appeal.

The only point urged by the appellant upon this appeal is that of the insufficiency of the evidence to justify the findings and judgment of the trial court.

The facts of the case are these: Virginia W. Bosworth was on and prior to the eighteenth day of October, 1911, the owner of the premises in question. She was the mother of Paul H. Bosworth, and grandmother of the plaintiffs, and also of the defendant Virginia Bosworth, a minor, the latter being the daughter of said Paul H. Bosworth. On said eighteenth day of October, 1911, being on her deathbed, and desiring that her said property should be devoted to the maintenance and support of her said grandchildren, and having the fullest confidence in the integrity of her son, Paul H. Bosworth, she executed and delivered to him a deed absolute in form to the premises in question, and said Paul H. Bosworth then and there orally agreed and promised that he would hold said real estate in trust for the benefit of the said grandchildren of his dying mother, and for the purposes specifically to be set forth in a declaration of trust to be thereafter prepared and signed by him. Shortly thereafter said Paul H. Bosworth did prepare and execute a purported declaration of trust.

Upon the trial of the cause practically all of the foregoing facts were admitted by said Bosworth, who then asserted, and undertook to prove, a set of facts tending to show that he had not acted in violation of the terms of his trust. Upon this appeal, however, the appellant contends that the trust itself

was invalid for two reasons: First, that the oral declaration of trust made at the time of the execution of the deed to said Bosworth by his mother was void because not in writing, as required by the sections of the Civil Code relating to express trusts; and, second, that the declaration of trust thereafter prepared and signed by him was too indefinite in its terms for enforcement in a court of equity.

There is no merit in either of these contentions. So far as the case rested—if it was required to rest at all—upon the trust arising out of the oral promises of the appellant, the case would come clearly within the line of authorities relating to constructive trusts arising out of the fraud of the trustee in his attempted renunciation of the terms of his oral trust, among which are the following cases: *Brison v. Brison*, 75 Cal. 525, 527, [7 Am. St. Rep. 189, 17 Pac. 689]; *Lauricella v. Lauricella*, 161 Cal. 61, [118 Pac. 430]; *Bradley Co. v. Bradley*, 165 Cal. 237, [131 Pac. 750]; *Lamb v. Lamb*, 171 Cal. 577, [153 Pac. 913]. The trust thus constructively arising would have been valid and enforceable in a court of equity had the appellant herein made no other or written declaration of the fact and terms of his trust. The court finds, however, that the appellant did in fact make a declaration of trust shortly after the receipt of the deed from his mother to the premises in question.

The appellant contends that this declaration of trust was void for indefiniteness in its terms. The evidence showed, and the court found, that this written declaration of trust was drawn by the trustee himself, and this fact furnishes an added reason for the application of the well-known rule of construction that written instruments are to be construed most strongly against their maker. Whatever of indefiniteness appears in this declaration of trust was created by the trustee himself; but, regardless of this fact, an inspection of the writing will show that there is no such indefiniteness in its terms as would suffice to defeat it. The fact that it is intended to be a declaration of trust expressly appears; the beneficiaries are named; the property is described; the duties of the trustee in the matter of the collection of rents and care of the property are defined; and, in the event of a sale of the property by the trustee, the distribution of the proceeds among the beneficiaries share and share alike is provided for. It is true that the trustee is not expressly authorized to make a sale of the

premises, but such is the clear implication of the writing. It is true also that the term of the trust is not stated, but this also would arise by necessary implication from the provision relating to the distribution by the trustee of the trust property upon its sale.

It follows that the findings of the court as to the existence and validity of the trust are fully sustained, as are also the findings of the court relating to the violation of its terms by the trustee.

The judgment was therefore supported by the proofs and findings in the case.

Judgment affirmed.

Kerrigan, J., and Beasly, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 16, 1917.

[Civ. No. 2058. First Appellate District.—May 18, 1917.]

OMA A. DAVIES, Respondent, v. I. S. PATTON et al.,
Appellants.

FORECLOSURE OF MORTGAGE—CONCEALMENT OF OWNERSHIP OF PRIOR MORTGAGE—RETENTION OF POSSESSION.—In an action to foreclose a second mortgage, which was given in connection with a first mortgage, for the unpaid purchase price of the mortgaged property, the mortgagors cannot contend that the plaintiff should be denied equitable relief on the ground that they were deceived as to the ownership of the first mortgage, where they remained in possession of the property, were not damaged by the concealment, and made no attempt at rescission of the transaction, or offer to return the property.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. Wm. H. Donahue, Judge.

The facts are stated in the opinion of the court.

F. H. Dam, for Appellants.

George Clark, and Black & Clark, for Respondent.

THE COURT.—This is an appeal from an action to foreclose a mortgage. It appears that the parties to this action had entered into an agreement for the sale and purchase of a certain piece of real property in Alameda County for the sum of six thousand dollars; that the defendants and appellants paid on account thereof one thousand dollars, and went into possession. In payment of the balance they executed two promissory notes, one for three thousand dollars secured by a first mortgage upon the property purchased, and the other for two thousand dollars secured by a second mortgage. The first mortgage, according to the understanding between the parties to this appeal, was to be owned and held by a certain bank in Oakland, and the second mortgage was to be owned and held by the plaintiff. When this suit was commenced, the appellants learned that the bank in fact was not the owner of the mortgage executed in its name, but held the same for the plaintiff, who in fact had always been the owner of both encumbrances. The appellants claimed in the trial court, and now urge here, that the making of the deed of conveyance and the execution of the two mortgages constituted one transaction, and that the plaintiff in taking the first mortgage in the name of the bank, when in fact it belonged to her, deceived and defrauded them, in consequence of which the plaintiff cannot avail herself of the equitable arm of the court for the foreclosure of the second mortgage—the one concerned in this suit.

From the evidence in the case it is clear that the plaintiff was prompted by no oppressive or wrongful intent in allowing the appellants to suppose that they were dealing with the bank in question in the matter of the first mortgage, and probably conducted that part of the transaction in the manner indicated solely for the purpose of securing prompt payment of that part of the appellants' obligation. It is quite evident, too, that the appellants had no serious objection to the plaintiff owning the first mortgage, for they in fact, according to the evidence introduced by the plaintiff, had requested her to take a mortgage for the full amount of the unpaid purchase price of the property. But aside from all of this, it appears that the appellants were and are in possession of the property, they were not damaged by the concealment, they attempted no rescission of the transaction or of any part of it, have not offered to return the property, but appear to think they may

retain it and repudiate any obligation under their mortgages. Such a position cannot be given judicial countenance. (6 Cyc. 314; 35 Cyc. 146; 20 Cyc. 92; *California Steam Nav. Co. v. Wright*, 8 Cal. 585, 592.) In our opinion the appeal is entirely devoid of merit.

The judgment and order are affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 16, 1917.

[Civ. No. 1816. Second Appellate District.—May 18, 1917.]

WING CHUNG LONG COMPANY (a Partnership), Respondent, v. PRUSSIAN NATIONAL INSURANCE COMPANY (a Corporation), Appellant.

FIRE INSURANCE—CANCELLATION OF POLICY—MISSTATEMENT OF GROUNDS.

Where a policy of fire insurance gives the insured and the insurer a mutual right of cancellation without limitation to conditions or contingencies, it is not necessary that the insurer in giving notice of cancellation should state the ground upon which the cancellation was based, and a statement in such a notice that the policy was canceled for nonpayment of premium, when in fact the premium had been paid, does not affect the validity of the cancellation.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

John R. Layng, for Appellant.

G. C. De Garmo, for Respondent.

JAMES, J.—The judgment in this case was for the plaintiff; the appeal from the judgment is presented on a judgment-roll and a bill of exceptions.

The action was to recover upon a fire insurance policy. Plaintiff, in December, 1912, secured through one Youtz, a broker, insurance from the defendant corporation as evi-

denced by its policy of that date. This policy was in form that known as "California Standard," as prescribed in an act of the legislature of 1909. (Stats. 1909, p. 404.) The policy, corresponding to the terms of the statute, contained this clause as to conditions under which cancellation thereof might be made by either party:

"This policy shall be canceled at any time at the request of the insured, in which case the company shall, upon surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be canceled at any time, without tender of unearned portion of premium, by the company by giving five (5) days' written notice of cancellation to the insured and to any mortgagee or other party to whom, with the written consent of the company, this policy is made payable, in which case the company shall, upon surrender of the policy or relinquishment of liability thereunder, refund the excess of paid premium above the *pro rata* premium for the expired time."

On March 25, 1913, the defendant company transmitted to the insured the following letter:

"March 25th, 1913.

"Wing Chung Long Company,
"307½ Marchessault Street,
"Los Angeles, Cal.

"Gentlemen: In accordance with the insurance laws of the state of California as set forth in the printed conditions of the California Standard Form Fire Insurance Policy, by lines numbered 95, 96, 97, 98, 99, 100, 101 and 102 stipulations and conditions specially referred to, I, the undersigned, acting under the authority conferred on me as general agent of the Prussian National Underwriters, in the state of California, do hereby give you notice of the cancellation of the Prussian National Underwriters policy No. 912575, issued to secure against loss by fire in the amount of \$700 to your stock and fixtures at #307½ Marchessault street, state of California. This notice operative immediately.

"Kindly return the policy to this office by early mail. The earned premium under the policy is 4.95, which please remit

"Yours very truly,
"JOHN A. PRINSSEN,
"General Agent."

The plaintiff alleged that in January, 1913, the defendant attempted to cancel the policy by serving a notice that the policy would be canceled for nonpayment of premium unless within five days the plaintiff paid such premium, and that as the plaintiff had made payment of the premium, it was led to believe "that if said premium was in fact paid said policy would not be canceled, and this plaintiff knowing that said premium had been paid did not deliver said policy to said company, and did not make demand upon said company for the return of any unearned premium thereon. That said plaintiff was entirely misled and deceived by said notice sent to said plaintiff, as aforesaid." On September 1, 1913, the merchandise described in the policy of insurance was destroyed by fire and proof of loss was made by the plaintiff; whereupon the defendant company made reply by letter as follows:

"Gentlemen:

"Proof of loss under policy number and agency as above noted, was duly received and after referring to our files find that said policy was duly canceled for nonpayment of premium; and holding as we do your acknowledgment of said notice therefor in due form we return herewith said papers (proof of loss and schedule), declaring that we cannot accept of same or admit liability thereunder."

This letter was signed by the same general agent of the defendant whose signature was attached to the letter of March 25, 1913. It was stipulated at the trial that upon receipt of the letter of March 25th, plaintiff took the same to Youtz, the broker, and that Youtz advised the plaintiff to pay no attention to the same, and that the plaintiff did not tender a surrender of its policy or demand the unearned premium from the defendant. There was no testimony showing what effect this advice of Youtz (conceding it to be material) had upon the plaintiff, and there was no testimony showing whether plaintiff secured other insurance upon its property. It was stipulated that the premium had in fact been paid to Youtz at the time the policy was issued, and that for the purpose of collecting the same Youtz was the agent of the defendant. The single question presented seems to be as to whether, assuming that the company based its notice of cancellation upon the ground that the premium had not been paid, when

in fact payment thereof had been made, the cancellation became of effect. As to whether the notice of cancellation clearly showed that the company elected to rescind because of alleged nonpayment of premium need not be determined; it may be assumed that such was the understanding which should be gathered from the notices received by the plaintiff. Counsel for respondent argues that having elected to cancel the policy upon a ground which was not available to it, for the reason that the facts were wanting to sustain it, the company is estopped to insist upon the cancellation. It will be noticed that as between the insured and insurer there is a mutual right of cancellation given under the policy, the form of which is prescribed by the statute hereinbefore referred to. The insured has the right to elect arbitrarily to cancel the policy, and the insurer has the same arbitrary right to cause cancellation to be made, with the condition that the notice of cancellation shall not become effective for five days. This latter provision undoubtedly is for the purpose of allowing the insured to obtain other insurance if he so desires. If the right of the insurer to cancel its policy was limited to certain conditions or contingencies, then where notice of cancellation referred to one of those grounds, such as nonpayment of premium, such notice would be ineffectual where the insured could show that the premium in fact had been paid, even though, had some other of the permitted grounds been assumed by the insurer, the notice of cancellation would have been effective. In such a case the argument of respondent without doubt would be incontrovertible. Here the notice given to the insured definitely informed the latter that cancellation was made of the policy. The insurer was not under necessity to state the grounds upon which such cancellation was based, and a misstatement of the grounds which might have influenced it to take the action would not, in our opinion, have the effect of nullifying the notice of cancellation. The trial court made a finding that the notice of cancellation was misleading. The notice was not misleading in that there was any ambiguity or uncertainty as to the advice given by it to the insured that the policy was canceled, and the finding referred to, to our mind, fails to find support in the evidence. Our conclusion is that, on the record as it is presented to us, the judgment for the plaintiff cannot be sustained.

Other questions argued by appellant we think it unnecessary to discuss, in view of the conclusion expressed upon the main proposition involved in the case.

The judgment is reversed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

[Civ. No. 1862. Second Appellate District.—May 18, 1917.]

H. E. OFFICER, Respondent, *v.* AVERY MILL AND LUMBER COMPANY (a Corporation), Appellant.

SALE OF LUMBER—ACTION FOR PRICE—EVIDENCE—CUSTOM.—In an action to recover judgment for an amount alleged to be due on a shipment of lumber before the expiration of the sixty-day period allowed under a custom prevailing in the lumber business, the notoriety of a custom supplementary thereto to the effect that if a buyer is sued by any creditor on any account before the expiration of such period the bill immediately becomes due, is sufficiently shown to impute to the defendant a knowledge of its existence by evidence that the custom was in general usage and effect in the lumber trade in this state at the time of the sale, and that it was then commonly known and recognized among lumber dealers.

APPEAL from a judgment of the Superior Court of Tulare County, and from an order denying a new trial. J. A. Allen, Judge.

The facts are stated in the opinion of the court.

E. I. Feemster, for Appellant.

Lamberson, Burke & Lamberson, for Respondent.

WORKS, J., *pro tem.*—This is an appeal from the judgment and from an order denying a motion for a new trial.

The action was brought to recover judgment for an amount alleged to be due on a shipment of lumber. The parties agree as to the sum that is unpaid, but the appellant contends that the bill was not due when the suit was commenced. It is conceded that, under a custom prevailing in the lumber business,

the sale was at sixty days' time, but the action was begun within that period. The respondent justifies the early prosecution of the suit under an alleged custom of the business, supplementary to the custom that sales are at sixty days, to the effect that if a buyer is sued by any creditor on any account before the expiration of sixty days after a given sale of lumber, the bill immediately becomes due. Evidence was introduced tending to show that an action had been filed against the appellant by a certain plaintiff within sixty days after the sale to appellant and before the commencement of this action, and evidence of the alleged custom was also received.

The appellant makes the contention that the findings are not supported by the evidence in two respects. The first of these is that there was no evidence of the existence of such a custom as the one relied on by respondent. We have read the record and our inspection of it convinces us that the point is not well taken.

The second point made is that the evidence does not show a custom of such notoriety as to impute to appellant a knowledge of its existence; but the witness Cooper testified that the custom was "in general usage and effect in the lumber trade in California" at the time the lumber was sold, and he further said that it was then "commonly known and recognized among the retail lumber dealers." Moreover, there is some evidence that the appellant had actual knowledge of the custom. The testimony of Cooper tended to show that notice of its existence was printed in certain lists issued by the larger lumber concerns which sell to the retail dealers, and he said, "If I remember rightly, I asked Mr. Avery," the president of appellant, "if he had any of those lists, and he said he had a bunch of them or our acknowledgments to them."

The judgment and order are affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2049. First Appellate District.—May 19, 1917.]

A. J. LILJEFELT, Appellant, v. CHARLES BLUM et al., Respondents.

ASSAULT AND BATTERY—DEFAULT IN ACTION FOR DAMAGES—JUDGMENT FOR DEFENDANTS—PRESUMPTION UPON APPEAL.—In an action for damages for assault and battery, where the defendants made default, and the trial court, upon application of plaintiff, gave judgment for the defendants, it will be presumed on appeal from the judgment, in the absence of any record of the evidence or findings, that plaintiff, although assaulted, was not damaged.

Id.—NOMINAL DAMAGES — FAILURE TO AWARD — INSUFFICIENT GROUND FOR REVERSAL.—A judgment will not be reversed on appeal for failure to award nominal damages.

APPEAL from a judgment of the Superior Court of Alameda County. Everett J. Brown, Judge.

The facts are stated in the opinion of the court.

Amasa C. Smith, and Southard M. Modry, for Appellant.

Chas. Blum, and Jane Doe Blum, *in pro. per.*, for Respondents.

THE COURT.—In this action plaintiff asked damages in the sum of ten thousand dollars for an assault and a battery committed on him by the defendant, Jane Blum, who is the wife of the other defendant. Defendants defaulted, and application was made by the plaintiff to the court for the relief demanded in the complaint. The trial court gave judgment for the defendants. The case is here upon the judgment-roll alone. Findings were waived by plaintiff, and the evidence not being before this court it is unable to determine upon what facts the trial court acted. It does appear that the defendant, Jane Blum, and one other witness were examined. The defendants having defaulted, the hearing on plaintiff's application for judgment was governed, as is conceded, by subdivision 2 of section 585 of the Code of Civil Procedure, under which the only question before the trial court was that of damages. In the absence of both the evidence and findings this court must presume in support of the

judgment that plaintiff, although assaulted, was not damaged. The plaintiff contends that, as all the facts alleged in his complaint were admitted by the default, he was entitled to nominal damages and his costs; but a judgment for nominal damages would not have carried costs; and conceding, but not deciding, that the plaintiff was entitled to a judgment for nominal damages, this court will not reverse this case because of a failure of the trial court to find in favor of plaintiff for nominal damages only.

Judgment affirmed.

[Civ. No. 1998. First Appellate District.—May 21, 1917.]

W. E. DEAN, Appellant, v. M. S. GAME, Respondent.

PROMISSORY NOTE—ASSIGNMENT FOR COLLECTION—WANT OF CONSIDERATION—DEFENSE NOT AVAILABLE.—In an action on a promissory note assigned for the purpose of collection, the defendant is not entitled to plead that the note was without consideration as against the assignee, where his assignor became the holder of the note in good faith and for value before its maturity.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge.

The facts are stated in the opinion of the court.

Chas. Quayle, for Appellant.

C. J. Goodell, for Respondent.

THE COURT.—Respondent in this action executed his negotiable promissory note for the sum of \$530.31, payable to the order of one D. J. Gregor ten days after its date, which said note was indorsed by one P. T. Brunsing, and was thereafter and before maturity indorsed and transferred by the payee thereof to one John F. Smith, who paid to said Gregor the sum of five hundred dollars. The real transaction between the original parties to the note was this: It was agreed between Game, Gregor, and Brunsing that Game was to execute and Brunsing indorse said note to Gregor, who was to

negotiate the same with Smith, who was to pay Gregor the sum of five hundred dollars therefor, which sum was to be divided among the original parties to the transaction. Smith had no knowledge of said dealings between the parties thereto, and took and held said note until after its maturity as a holder in good faith for value and without notice of any equities between the original parties thereto. After maturity, Smith transferred said note to the plaintiff and appellant herein for collection. Upon the trial of the cause the respondent Game, as a defense to said action, pleaded the original transaction between the parties, and further averred that Gregor had paid to him no portion of the money which he had received from Smith, and that therefore as to him the note was without consideration. The trial court gave judgment for the respondent Game, holding that the plaintiff, as the transferee of the note simply for collection, was not a holder thereof for value, and that as to him the defendant Game was entitled to plead the want of consideration for the note.

In so doing we think the trial court was in error. It is conceded that Smith became the holder of the note in good faith and for value before its maturity, and that had this action been brought by him the respondent's defenses would not have been available to him. This being so we are satisfied that the plaintiff, taking the note simply for collection, stands in the shoes of Smith and has as good title and right of action as Smith himself had. (1 Daniel on Negotiable Instruments, sec. 726; Randolph on Commercial Paper, sec. 987; *Poorman v. Mulls*, 39 Cal. 345, [2 Am. Rep. 451]; *Bank of Sonoma County v. Gove*, 63 Cal. 355, [49 Am. Rep. 92]; *Eames v. Crosier*, 101 Cal. 260, [35 Pac. 873]; *Sinkler v. Siljan*, 136 Cal. 356, [68 Pac. 1024]; *O'Conor v. Clarke*, 5 Cal. Unrep. 323, [44 Pac. 482].)

Upon the authority of the foregoing cases the judgment will be reversed. It is so ordered.

[Civ. No. 1655. Third Appellate District.—May 21, 1917.]

VICTORIA ALDEN, Appellant, v. C. E. MAYFIELD, Respondent.

LANDLORD AND TENANT—RECOVERY OF TREBLE RENTS—WILLFUL WITHHOLDING—SUFFICIENCY OF EVIDENCE.—In an action by a landlord to recover possession of demised property, rents due up to the time of the termination of the tenancy and for treble rent for the period subsequent to that date, a willful holding over is established under section 3345 of the Civil Code by evidence of deliberate, intentional, obstinate refusal to surrender possession with knowledge that the tenancy had been terminated, and that the tenant was holding over against the will and consent of the landlord, and not under a reasonable claim of right.

ID.—WILLFUL HOLDING OVER—OMITTED ALLEGATION—CURE BY ANSWER. While in an action to recover treble rents for holding over after demand and one month's notice in writing, the complaint should contain an allegation that the holding over was willful, the omission of such an allegation is cured by the allegation in the answer that the defendants from the date of the termination of the tenancy retained possession of the premises in good faith and under claim of right.

APPEAL from a judgment of the Superior Court of Solano County, and from an order denying a new trial. **A. J. Buckles and W. T. O'Donnell, Judges.**

The facts are stated in the opinion of the court.

W. U. Goodman, for Appellant.

T. T. C. Gregory, C. J. Goodell, and Dan Hadsell, for Respondent.

BURNETT, J.—The action was brought to recover possession of certain real property in Suisun, Solano County, for rents due up to the time of the termination of the tenancy, and for treble costs for the period subsequent to that date. At the first trial judgment was rendered for defendant, from which an appeal to the supreme court was taken and a reversal had. (*Alden v. Mayfield*, 164 Cal. 6, [127 Pac. 45].) The new trial resulted in a judgment "that said plaintiff have and recover from said defendant the sum of six hundred and

fifty dollars with interest thereon from the first day of April, 1911, . . . and that plaintiff is not entitled to and shall not recover treble rents." From this judgment, and the order denying her motion for a new trial, plaintiff has appealed, claiming that the rent due was one thousand dollars, and that it should have been trebled, that the judgment, in other words, should have been in her favor for three thousand dollars.

Two questions, then, are presented for determination: First, whether there is any evidence to support the finding of the trial court that the rental value of the premises was \$65 per month; and, second, whether there is any justification for the court's conclusion that the rent should not be trebled.

As to the first of these considerations there can be no kind of doubt. Appellant argues at length, and with persuasive force, that the rental value was actually one hundred dollars per month. There is undoubtedly evidence to support the contention, but Mr. Mayfield testified that the reasonable rental value "was \$65.00 per month. . . . The rental value of that property from June 1st to the time I vacated was not one cent in excess of \$65.00 per month. In proportion the other rents for adjoining places were lower. In that neighborhood they were lower." He was a qualified witness, and, in view of the finding of the court below, his testimony must be accepted here at its face value. Further discussion of that matter is foreclosed.

The position of appellant as to the other question is based upon section 3345 of the Civil Code, providing: "If any tenant, or any person in collusion with the tenant, holds over any lands or tenements after demand made and one month's notice, in writing given, requiring the possession thereof, such person holding over must pay to the landlord treble rent during the time he continues in possession after such notice."

There is no doubt that such notice was given and defendant held over for ten months thereafter, but the defense is sought to be made that the holding over must be "willful," in order to subject the tenant to the penalty provided by said code section, and that the lower court by its finding negatived the existence of this element. Attention is called to the fact that the headnote of said section is: "Tenant willfully holding over," and the contention is made, supported by authority, that this must be deemed an important part of said section, and be accorded the same effect as though included in the

body of the law. As a legal proposition this may well be conceded, and we need not review the cases cited to the point.

But we are of the opinion that the element of willfulness was clearly shown, and that the finding to the contrary is entirely unsupported. There seems to be in that regard no substantial difference between the showing at the second trial and at the first. It is appropriate, therefore, to quote the following language of the supreme court in said opinion (164 Cal. 6, [127 Pac. 45]): "The difficulty with this argument [referring to the contention that there was a waiver by reason of the deposit of the rent] is that the defendant was informed before the deposit of money, both by the principal and by her attorney, that Haile no longer had anything to do with the matter, and we repeat that defendant's endeavor under those circumstances to re-establish the relationship of tenancy with the landlord who had repudiated him and terminated the tenancy was but a shallow bit of subterfuge and trickery. . . . Still further in this connection it is to be noted that the defendant does not deny, as it was incumbent upon him to deny, the allegation that he was holding over against the will and consent of the plaintiff. This he admits and the admission under the circumstances is a pregnant one. It amounts to an admission that he knew there was no waiver and no continuation of the tenancy so far as plaintiff was concerned. . . . Therefore, the evidence, so far from establishing a waiver, with all that a waiver implies—a meeting of minds and the intentional forbearance to enforce a right—clearly establishes that there was no waiver, but only an effort by defendant surreptitiously to do something which might in some way advantage him and enable him the longer to hold possession. This is made manifest from the fact that defendant was not prepared to lease the building, had no other location or store in which to move his goods, and was desirous of remaining where he was until he could secure other accommodations." It may be added that the allegations of defendant's cross-complaint still further negative the idea that there had been any waiver of plaintiff's right to the possession, or that defendant could have believed that there was a renewal of the tenancy. The claim for damages set up in his cross-complaint was based upon the theory that plaintiff and her agent, Haile, were trying to obtain possession of the premises, even going to the extreme on the part of Haile of making

threats and creating disturbances in the store in order to induce defendant to evacuate.

All these things would seem to show conclusively a willful withholding of the premises on the part of respondent. Doubtless the word "*willful*" is used in different statutes with various shades of meaning, but herein the conduct of defendant in refusing to surrender possession was deliberate, intentional, and obstinate, with knowledge that the tenancy was terminated, and that he was holding over against the will and consent of the landlord. We think nothing more is required to constitute *willfulness* on the part of the tenant.

For many illustrations of the use of the term, and of the different significations attached to it, we may refer to Words and Phrases, volume 4, page 1293 (second series). Probably the following quotation therefrom is as instructive as any that could be selected: "The word '*willfully*' has various meanings and is used to denote the quality of an act, or the intent with which it is done. It is frequently used in the sense of intentionally, willingly, designedly, or with set purpose. When used in criminal statutes it usually means with a malevolent purpose or motive, with a wicked or criminal intent, especially if the forbidden act is one that is wrong in itself or involves moral turpitude; but if the forbidden act is not wrong in itself or does not involve moral turpitude, the word is then used in the sense of intentionally or purposely, so that when the act is so done it is done willfully. The word, however, should be given that meaning only which the context indicates was intended. (*United States v. Sioux City Stock Yards Co.*, 162 Fed. 556.)"

We do not think the full measure of the criminal code should be applied to a case like this—that it is necessary, in other words, to find that the act of the one holding over is with "*a malevolent purpose*," in order to justify the infliction of the penalty, but it is sufficient if his conduct be intentional, with knowledge of the termination of the tenancy, and that the holding over is against the will and consent of the landlord and not under a reasonable claim of right. Where the conduct of the tenant is characterized by good faith and a reasonable belief in his right to remain, the penalty should not, of course, be imposed, but we can find in the record no warrant for the application of this principle.

However, it is contended by respondent that "To recover treble rents the statute upon which plaintiff relies must be expressly referred to in the complaint." In support of this position he cites *Chipman v. Emeric*, 5 Cal. 239; *Barnes v. Jones*, 51 Cal. 303; *Stewart v. Sefton*, 108 Cal. 197, [41 Pac. 293]; 13 Cyc. 178; 8 R. C. L., p. 626.

The Chipman case involved an action of waste at common law. The jury found for the plaintiff and the lower court trebled the damages. The judgment was reversed and judgment ordered to be entered for the amount found by the jury. This was done upon the authority of Bacon's Abridgment, wherein the rule was stated as follows: "When treble damages are given by a statute, the demand for such damages must be expressly inserted in the declaration which must either recite the statute or conclude to the damage of the plaintiff against the form of a statute." It is claimed that this decision has never been overruled or criticised. However, in this connection it may be suggested that the case was decided under a different statute from the one before us, that in the present case there is a prayer for treble damages, and that no objection on this ground was made to the complaint or to the evidence herein.

The Barnes case was reversed really upon the ground that there was no intended trespass, but that the wrong was committed through an innocent mistake, although the court, in the course of the opinion, did declare: "But upon our construction of the statute, the complaint fails to state a case entitling the plaintiff to treble damages. It contains no averment that the trespass was willful, but only that the entry and cutting of the timber was wrongful and without the plaintiff's leave. The statute has no application to such a case; and though good as an action at common law, entitling the plaintiff to recover his actual damage, the complaint does not state a case in which the damages can be trebled."

The Stewart case approved the above-stated rule and held that "to entitle the plaintiff to treble damages, under section 733 of the Code of Civil Procedure, she must have proved her allegation that defendant willfully or maliciously removed the trees, knowing them to be the property of plaintiff."

The statement in Cyc. is: "Where damages sought to be recovered arise by virtue of statute, or the amount thereof is determined or augmented by reason of statutory enactments,

the complaint must allege facts sufficient to bring the case clearly within such statute, and as defendant should be apprised of the demand against him, it is the better practice, and in most jurisdictions necessary, that reference be made thereto, especially if the injured party has also a remedy at common law."

The statement from Ruling Case Law is: "And where one seeks to recover penal damages given by statute he must distinctly claim them in his declaration. It is insufficient merely to set forth facts upon which a liability therefor might arise. If the case is one where there was also a common-law remedy, they must be claimed by reference to the statute. . . . If the wrongful act is of such a character or is attended by such conduct or *animus* of the defendant that the law authorizes the assessment of exemplary damages the complaint should so describe the act that it may appear therefrom to be such a case."

We may accept the rule as requiring an allegation of willfulness or its equivalent, and it may be conceded that the complaint herein is defective in the respect indicated. It might be thought that the element of willfulness is implied in the following allegations of the complaint: "That on or about the 12th day of April, 1910, in the town of Suisun city, county of Solano, state of California, the said plaintiff gave to and served on said defendant her written notice terminating said tenancy and requiring defendant to deliver possession of said premises to said plaintiff on the first day of June, 1910, a copy of which notice is hereto attached, marked plaintiff's Exhibit 'B' and made a part of this complaint to which reference is hereby made. That the said defendant failed, neglected, and refused on the first day of June, 1910, to deliver up said possession and continues in possession of same without the consent and against the will and wish of plaintiff; that said defendant now withholds the possession of said premises from the said plaintiff." But it is apparent that these allegations are consistent with the position that defendant was holding under a claim of right and in good faith, notwithstanding it was "against the will and wish of plaintiff." If the additional averment had been made that the possession was retained under no claim of right, and not in good faith, there is no doubt the element of *willfulness* would have been tendered, although the word "*willful*" or its derivative might not have been used.

But it can be said that this defect of the complaint was virtually cured, and the issue presented by this averment in the answer: "Defendant alleges that from and after and including the said first day of June, 1910, he was in the peaceable possession of the said premises, and in retaining possession thereof for the said period he acted in good faith and under a claim of right and title thereto for the said period."

It would be proper, therefore, for the court to have made a finding as to this allegation of said answer. There was no such specific finding, although it may have been considered as included in the declaration that "said withholding was not willful on the part of the defendant."

It may be added that the case was tried upon the theory that said issue was presented, and in view of the foregoing considerations we are of the opinion that substantial justice has not been done.

Upon a new trial there may be, of course, some additional evidence tending to show that respondent acted in good faith, but the record before us leads to a different conclusion.

The judgment and order are reversed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 2071. First Appellate District.—May 22, 1917.]

J. A. PELL, Administrator, etc., Respondent, v. STANLEY HERBERT, Appellant.

NEGLIGENCE—CARBOLIC ACID GIVEN FOR WHISKY—SUFFICIENCY OF EVIDENCE.—In an action for damages for death caused by the defendant in giving the deceased a drink from a bottle containing carbolic acid under the belief that it contained whisky, the gross negligence of the defendant is established by his conduct in keeping carbolic acid in a whisky bottle without any distinguishing mark or label showing its dangerous and deadly quality, of intermingling such bottle with such a content with other similar bottles containing whisky or other drinkables, and in tendering such bottle to the deceased accompanied with the statement that he guessed it contained whisky.

ID.—CONDUCT OF DECEASED—LACK OF CONTRIBUTORY NEGLIGENCE.—The act of the deceased in accepting the defendant's proffered drink,

and of assuming without question or investigation that the bottle from which he drank contained liquor similar to that which he had just seen the defendant drink, and in believing it to be the whisky which he had just been invited to partake of, did not constitute contributory negligence, in view of the fact that the liquid which he drank was not poured out in a glass, or other open receptacle, where its color or smell or other dissimilarity to whisky might reasonably attract his notice and arouse his suspicion.

ID.—VERDICT NOT EXCESSIVE.—A verdict of two thousand dollars for the death of a human being in such an action is not so excessive as to justify the conclusion that the jury were moved by undue passion or prejudice in its rendition or amount.

APPEAL from a judgment of the Superior Court of Monterey County. J. A. Bardin, Judge.

The facts are stated in the opinion of the court.

Andsesen & Sargent, and P. E. Zabala, for Appellant.

Walter S. White, and Fred P. Feliz, for Respondent.

RICHARDS, J.—This is an appeal from a judgment in plaintiff's favor for the sum of two thousand dollars damages for the alleged negligence of the defendant resulting in the death of one Gabino Smith, of whose estate the plaintiff is the administrator.

The two points urged by the appellant are the insufficiency of the evidence to justify the verdict of the jury; and the contention that the verdict is excessive in the amount of its award.

The facts of the case are these: The defendant is a rancher residing in Monterey County. On the morning of September 28, 1913, the deceased, Gabino Smith, who was at that time his employee, came up to his house to wash before breakfast. The defendant was in the act of taking a drink of whisky from a bottle which was sitting on the wash-sink, and offered the deceased a drink, which he indicated his willingness to accept. There was very little left in the bottle from which the defendant had been drinking, so he reached under the sink and got what he apparently supposed was another bottle of whisky, and handed it to the deceased, stating that he guessed it was whisky. The deceased drank from the bottle which was handed him, and immediately after doing so said to the

defendant, "What kind of a trick did you play on me?" and went presently into convulsions, and died within a few moments. The bottle from which he drank contained carbolic acid.

The foregoing facts were proven at the trial and formed the basis of the jury's verdict in plaintiff's favor.

The appellant contends that the inference of negligence does not arise from the foregoing facts, and that even if such inference does arise, the facts also establish contributory negligence on the part of the deceased sufficient to have defeated the plaintiff's recovery.

We are unable to agree with either of these contentions. The defendant's conduct in keeping carbolic acid, a deadly poison, in a whisky bottle without any distinguishing mark or label showing its dangerous and deadly quality, and of intermingling such bottle with such a content with other similar bottles containing whisky or other drinkables; and the act of the defendant in tendering such bottle containing carbolic acid to the deceased under the circumstances which he himself detailed, were acts of gross negligence amply sufficient to justify the verdict in plaintiff's favor.

The acts of the deceased in accepting the defendant's proffered drink, and of assuming without question or investigation that the bottle from which he drank contained liquor similar to that which he had just seen his employer drink, and in believing it to be the whisky which he had just been invited to partake of, were in keeping with the ordinary and customary conduct of other individuals under like circumstances. It is to be noted that the liquid which he drank was not poured out in a glass, or other open receptacle, where its color or smell or other dissimilarity to whisky might reasonably attract his notice and arouse his suspicion, but that he was handed the bottle and was expected to and did drink directly from it. Under these circumstances we cannot say as a matter of law that his act in so doing was contributory negligence.

In support of the appellant's contention that the verdict of the jury was excessive, he directs our attention to certain evidence tending to show that the deceased was a man of dissolute and unthrifty habits, and was not a very useful member of society or supporter of his family. These were matters properly submitted to the jury, and doubtless considered by

them in arriving at the amount of their verdict. We are unable to say that a verdict in the sum of two thousand dollars for the death of a human being, through the negligence of another under the circumstances detailed in this case, was so excessive as to justify the conclusion that the jury were moved by undue passion or prejudice in its rendition or amount.

Judgment affirmed.

Beasly, J., *pro tem.*, and Kerrigan, J., concurred.

[Civ. No. 1859. Second Appellate District.—May 22, 1917.]

FRANK A. STEPHENS et al., Appellants, v. E. L. DAUGHERTY et al., Respondents.

GUARANTY—PLEADING—PRIMARY OBLIGATION OF PRINCIPALS.—In an action on a contract of guaranty given to secure the payment of rent, the complaint shows no right of recovery, where the facts stated do not show a primary obligation against the lessees corresponding to the obligation of guaranty.

ID.—DEFAULT IN PAYMENT OF RENT—RECOVERY OF LIQUIDATED DAMAGES—INSUFFICIENT COMPLAINT.—In an action on a guaranty to recover the amount stipulated as liquidated damages for failure of the lessees to pay the rent reserved in a lease, the complaint is insufficient where it is not alleged, or shown by the alleged facts that it would have been impracticable or extremely difficult to fix the actual damages accruing to the plaintiffs.

ID.—SURRENDER OF POSSESSION—PLEADING AND EVIDENCE—ACTUAL DAMAGES.—In an action on a contract of guaranty of payment of rent brought after surrender of possession of the demised premises, it is necessary for the lessor to plead and prove the amount of the actual damages suffered by him and coming within the terms of the bond.

APPEALS from judgments of the Superior Court of Los Angeles County. John M. York, Judge.

The facts are stated in the opinion of the court.

John A. Powell, and Hunsaker & Britt, for Appellants.

Simpson, Moody & Simpson, Stahl & Sayles, and Earle K. Backus, for Respondents.

CONREY, P. J.—The plaintiffs appeal from two judgments entered in favor of the defendants, following upon orders sustaining demurrers to plaintiffs' amended complaint.

As shown by the complaint, the plaintiffs, in October, 1912, made to one J. B. Dodson and his wife, Cora A. Dodson, a five-year lease of a certain apartment house in the city of San Diego for a stated aggregate rental payable at the rate of four hundred dollars per month. In that lease it was agreed as follows: "It is further understood and agreed that the parties of the second part as a part of this transaction shall cause to be executed and delivered to the said parties of the first part at the time of the execution of this lease, a good and sufficient guarantee or bond in the sum of twelve hundred (\$1200.00) dollars, as security for the payment by the said parties of the second part of the rent of said premises for three (3) months of said term immediately following the surrender of said premises, to the said parties of the first part, if surrender is made, or the three (3) months immediately following the forfeiture of this lease by the parties of the second part, as the parties of the first part may elect." The complaint alleges that as a condition of entering into said contract of lease, plaintiffs required of said lessees that they should furnish to plaintiffs a guaranty or bond to the effect above stated. Thereupon, in order to comply with that condition, and at the request of said lessees, at the same time and place, and as a part of the same transaction, and of said indenture of lease, the defendants, for the benefit of the plaintiffs and in consideration of the execution of said lease, made, executed, and delivered to the plaintiffs an undertaking, which is set forth in the complaint. The recitals of the undertaking refer to the above-mentioned stipulation contained in the lease, and by said undertaking the defendants guaranteed that "if said property described in said lease should be surrendered to the lessors, or if the said lessees should forfeit the said lease, then and in that case, we, or either of us, promise to pay to the said Frank A. Stephens and Florence L. Stephens twelve hundred (\$1200.00) dollars, said twelve hundred (\$1200.00) dollars shall become due and payable immediately upon the surrender of said premises to the said lessors, if surrender should be made, or immediately upon the forfeiture of this lease by the said lessees, if forfeiture should be made, as said lessors may elect." The guaranty was ac-

cepted by the plaintiffs, who thereupon executed and delivered the lease, relying upon the security of said bond, and if said bond had not been furnished plaintiffs would have refused to execute said lease. Thereafter, in May, 1914, on account of default in payment of rent for two successive months, plaintiffs made demand in writing upon the lessees for payment of the rent or surrender of possession of the leased property. Payment not having been made, the plaintiffs commenced an action against the lessees to forfeit the lease and to recover possession of the rented premises, together with the unpaid rent and damages for the unlawful detention of the property. And on July 30, 1914, judgment was entered in favor of the plaintiffs in that action against J. B. Dodson and Cora A. Dodson, the defendants therein, awarding to the plaintiffs possession of the leased premises and adjudging the lease to be forfeited. Said judgment was further in favor of the plaintiffs for the sum of one thousand eight hundred dollars, of which one thousand six hundred dollars was specified to be the rent for April, May, June, and July, 1914, and two hundred dollars was allowed as damages for unlawful detention of the leased premises. Thereafter, on August 6, 1914, the lessees surrendered the property to the plaintiffs. After such surrender of possession the plaintiffs commenced this action against the defendants to recover the sum of one thousand two hundred dollars, which they claim from the defendants under the bond executed by them as aforesaid.

The contract of the defendants being only a contract of guaranty, the complaint shows no right of recovery thereon unless the facts, as stated, show a primary obligation against the lessees corresponding to the obligation of guaranty. Sections 1670 and 1671 of the Civil Code are as follows:

“1670. Every contract by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.

“1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.”

It is not alleged in the complaint, nor do the facts alleged show, that it would have been impracticable or extremely diffi-

cult to fix the actual damages accruing to the plaintiffs on account of the surrender or forfeiture of the lease. If the code sections quoted above are applicable, facts should have been alleged bringing the case within the exceptions described in section 1671. "The rule stated in section 1670 of the Civil Code, must be presumed to apply in all cases, unless the party seeking to recover upon the agreement shows by averment and proof that his case comes within the exception mentioned in section 1671." (*Los Angeles etc. Assn. v. Pacific Surety Co.*, 24 Cal. App. 95, 99, [140 Pac. 295].) By section 1174 of the Code of Civil Procedure it is provided that in an action of unlawful detainer, where the plaintiff recovers for unlawful detainer by the defendant after default in the payment of rent, the court shall not only give judgment for the amount of the rent due, but shall also determine the damages occasioned to the plaintiff by such unlawful detention. It has been held that section 1174 of the Code of Civil Procedure, and certain sections of the Civil Code, provide rules for ascertaining damages in all kinds of actions for the recovery of real property. "When a tenant fails to pay rent as provided in the lease, the amount of damage is not extremely difficult to fix, and it certainly is not impracticable to fix the amount of such damage." (*Jack v. Sinsheimer*, 125 Cal. 563, 565, [58 Pac. 130].) It was in accordance with the law as thus stated that the plaintiffs in their action against the lessees were allowed damages for the unlawful detainer of the leased premises. It does not appear that the damages recovered against the lessees had anything to do with conditions which might exist after the actual surrender of the premises; therefore those damages do not represent any part of the amount claimed from the defendants in this action, since they had nothing to do with the payment of "rent" of said premises for time following the date of surrender thereof.

But the primary obligation of the lessees could not have existed to pay contract rent for premises which they were not to possess. There would be no consideration for such a promise. This forces us to the alternative that to be valid at all the obligation of the lessees must have had the nature of an obligation to pay damages for breach of the lease. The determination by the court in the action against the lessees, that the lessors were damaged in the sum of two hundred dollars, is not binding upon the defendants here, since they were not parties to that action. Besides, those damages were merely

for unlawful detention of the premises. To recover upon the undertaking it was necessary to plead and prove the amount of the actual damages suffered by the plaintiffs and coming within the terms of the bond. No such facts are stated in the complaint.

We have given attention to the contention of appellants that a valid agreement may be made (collateral to a lease agreement), that even though there be a forfeiture of the lease, the lessee shall remain personally liable for all or a specified portion of the "rent" for the unexpired portion of the term. It seems to us that the authorities to which appellants refer merely recognize the rule that, under certain circumstances, a landlord who has taken possession of leased property before the expiration of the term, may notify the tenant that in taking such possession he proposes to relet to another at the risk of the tenant, and that he will hold the tenant responsible for such portion of the rent as may remain unpaid after deducting the payments obtained from the new tenant. In such circumstances the possession of the property remains constructively the possession of the tenant, and the landlord does not take possession absolutely in his own right. But in the case at bar it appears that the plaintiffs elected to deprive the lessees of all interest in the leased premises and caused the lease to be absolutely terminated. That having been done, there could be no remaining obligation to pay rent. We think that the plaintiffs here are attempting to recover upon a guaranty, and thereby to enforce the payment of a penalty in a case where there existed no right except such as might be based upon proof of actual damages and of the amount thereof, but have failed to state those necessary facts.

We do not agree with the contention that the promise made by the defendants and their principals may be sustained on the ground that it was a part of the consideration furnished to the lessors for the execution of the lease. The contingent nature of the promise definitely distinguishes it from an actual consideration paid or agreed to be paid for the lease. For the same reason the execution of this undertaking bears no analogy to the payment of a bonus, or preliminary extra compensation, offered as an inducement to the execution of the lease.

The judgments are affirmed.

James, J., and Works, J., *pro tem.*, concurred.

83 Cal. App.—47

[Civ. No. 1869. Second Appellate District.—May 23, 1917.]

E. A. HARDISON PERFORATING COMPANY (a Corporation), Respondent, v. J. F. DAVIES et al., Appellants.

CLAIM AND DELIVERY—DEMAND BEFORE COMMENCEMENT OF ACTION—

PLEADING—SUFFICIENCY OF COMPLAINT.—In an action of claim and delivery, the complaint sufficiently shows that demand was made for the possession of the property before the commencement of the action, where it is alleged that the plaintiff on a stated day "demanded" possession and that the defendants "refused and now refuse" delivery, notwithstanding that the day stated was the day on which the complaint was filed.

APPEAL from a judgment of the Superior Court of Kern County, and from an order denying a new trial. Paul W. Bennett and Howard A. Peairs, Judges.

The facts are stated in the opinion of the court.

Geo. E. Whitaker, for Appellants.

E. L. Foster, and Chas. A. Barnhart, for Respondent.

WORKS, J., *pro tem.*—This is an appeal from the judgment and from an order denying a motion for a new trial.

The respondent delivered to the Hibernian Petroleum Company certain tools and implements, which were put to use by that corporation in an attempt to produce oil from a certain tract of land which it held under lease from appellant Davies. The Hibernian Company forfeited the lease and Davies, at the time of his re-entry upon the land, seized the personal property above mentioned as also forfeited to him under a certain provision of the lease. The Hardison Company commenced this action of claim and delivery for the recovery of the tools and implements, upon the theory that they had been loaned to the Hibernian Company and that the respondent had never parted with title to them. The respondent recovered judgment.

The appellants contend that the delivery of the personal property to the Hibernian Company was not a loan, but a sale, and that the evidence fails to sustain the finding of the trial court that the respondent was entitled to the possession

of the articles at the time the action was commenced. The witness Deuel, the vice-president and manager of respondent, has this to say of the delivery to the Hibernian Company: "The Hardison Company didn't dispose of its title to the property. It never has. I didn't receive any money from anybody for those tools. This is true in reference to every item on that list." On cross-examination he said further, referring to the president of the Hibernian Company: "I practically loaned him these tools with the price put on in case he lost any of them, because a great number of friends of mine were interested in the company. I was myself. I considered on account of these things it was best to let them use the tools." One of the directors of the Hibernian Company testified that the president of that corporation told the directors that the delivery of the tools to the company was "practically a loan, . . . and we will never be asked to pay for them." While these statements are largely conclusions and, under all the circumstances of the case, might have been regarded by the trial judge with suspicion, he was the sole judge of their weight and they are sufficient to support the finding which appellants assail.

The appellants insist that there was no showing that the commencement of the action was preceded by a demand that appellants deliver up the tools and implements. The complaint alleges, after setting out a list of the articles claimed, that on a certain day "the plaintiff demanded of the defendants the possession of the said personal property and the defendants refused and now refuse to deliver said personal property to the plaintiff," and the allegation was not denied in the answer. The difficulty is, however, appellants insist, that the day on which demand is thus alleged to have been made was the day upon which the complaint was filed. They contend for the rule that a pleading is to be construed most strongly against the pleader, and assert that such a construction shows the demand to have been made after, not before, the filing of the complaint. There are several obstacles to such a construction. A statement in the complaint indicating that demand was made after its filing would have been futile; and a construction showing the futility of an allegation in a pleading will not lightly be made as against a possible construction exhibiting its utility. Again, the allegation is that plaintiff, on the day mentioned, "demanded," and that de-

fendants "refused and now refuse," delivery of the property. The use of these terms demonstrates that the past and not the future was in the contemplation of the pleader.

The judgment and order are affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 19, 1917.

[Civ. No. 1834. Second Appellate District.—May 23, 1917.]

PIONEER INVESTMENT AND TRUST COMPANY
(a Corporation), Respondent, v. R. E. MUNCEY et al.,
Appellants.

EXECUTION — SUPPLEMENTAL PROCEEDINGS — ACTION FOR RECOVERY OF PROPERTY AGAINST ADVERSE CLAIMANT — TIME OF MAKING ORDER.—Upon proceedings supplemental to execution, where it appears that the person examined has property belonging to the debtor in which he claims an adverse interest, it is immaterial whether the order authorized by section 720 of the Code of Civil Procedure, giving the judgment creditor leave to maintain an action for the recovery of the same, be made at the time of the examination or a few days afterward.

ID.—RESTRAINT OF DISPOSITION OF PROPERTY PENDING SUIT—LACK OF SECURITY—CODE PROVISION CONSTITUTIONAL.—The provision of section 720 of the Code of Civil Procedure, authorizing the court in giving leave to maintain such an action to restrain the transfer or other disposition of the property pending the determination of the action, is not unconstitutional, because of the omission to make provision therein for security.

ID.—RECORD—SUFFICIENCY OF AUTHENTICATION.—Upon an appeal from orders made upon proceedings had supplemental to execution, the record is sufficiently authenticated under the provisions of sections 951 and 953 of the Code of Civil Procedure, where the papers and evidence used on the hearing appeared in the form of affidavits and written orders, and were stipulated by counsel to be correct copies.

APPEALS from orders of the Superior Court of Los Angeles County made upon proceedings supplemental to execution. John M. York, Judge.

The facts are stated in the opinion of the court.

Tanner, Odell, Odell & Taft, and John B. Beman, for Appellants.

Thomas Ball, for Respondent.

JAMES, J.—This is an appeal from orders made by the superior court upon proceedings had supplemental to execution. Plaintiff, a judgment creditor of defendant Muncey, having prepared an affidavit which was filed in the superior court, secured an order requiring the appearance of the judgment debtor and the Law Credit Company, a corporation. The affidavit set out the date of the recovery of the judgment, the fact that execution had been issued, and placed in the hands of the sheriff of the county of San Bernardino; that the sheriff had levied upon money in the hands of one William Thompson, a resident of the county of San Bernardino, which money the affiant alleged upon information and belief was the property of Muncey; that Thompson had made return admitting indebtedness to Muncey in the sum of \$550; and that he held such money subject to the order of court. The facts regarding the matter of Thompson's indebtedness to Muncey were then set out. It was stated in the affidavit that Muncey had recovered a judgment against Thompson which had become final, but that prior to the making of the levy under this plaintiff's execution, wherein Thompson was served with the writ, Muncey had assigned the judgment so obtained in his favor to the Law Credit Company. It was then asserted in the affidavit that the assignment was fraudulent and made for the purpose of preventing satisfaction being obtained of this plaintiff's judgment. On May 3, 1915, the transcript shows, the court made the following minute order: "Matters of examination concerning property regularly called. Thos. Ball, Esq., appearing as attorney for plaintiff and S. W. Odell, Esq., for defendant. R. E. Muncey is sworn, examined and discharged." On May 5th, what purports to be an order *nunc pro tunc* was made in the same matter by the court. It was recited therein that Muncey and the Law Credit Company having appeared on the third day of May, 1915, and having been examined concerning matters relative to the judgment which was assigned

by Muncey to the Law Credit Company, it was ordered that the plaintiff be given leave to file and prosecute an action against the Law Credit Company to vacate and set aside the assignment, and that the defendant Muncey and the Law Credit Company be forbidden to further transfer the judgment, have execution issued thereon, or to do anything in the premises until the further order of the court. It appears that the Law Credit Company immediately thereafter moved to set aside the order so purporting to have been made "*nunc pro tunc*," which motion was by the court denied. The proceeding as initiated by the affidavit was one authorized by sections 715 and 717 of the Code of Civil Procedure. Under section 715 a judgment debtor may be brought into court for examination concerning his property after execution has been issued, where proof is made to the satisfaction of the judge that he has property which he refuses to apply upon the judgment. Section 717 authorizes an order to be made requiring persons or corporations alleged to have property belonging to the judgment debtor of a value exceeding fifty dollars to appear and answer concerning the same. Section 720 provides that if it appears that such person or corporation claims an interest in the property adverse to the debtor, "the judgment creditor may maintain an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just." It did appear from the affidavit upon which the order for examination was issued that there was due on the Thompson judgment a sum in excess of fifty dollars; the affidavit stated sufficient facts in other particulars to warrant the court in proceeding to an examination of the judgment debtor Muncey and the Law Credit Company. So far as Muncey was concerned, it appears that by the order entered upon the minutes of the court he was completely discharged in the proceeding. By that minute entry it does not appear that the court made any order affecting the Law Credit Company. On behalf of the corporation appellant, it is urged that the court was without authority to make the *nunc pro tunc* order affecting it. In our opinion, the order does not

possess a *nunc pro tunc* character, but is an order which the court was authorized to make following the hearing had, so as to dispose of the matter as affecting the Law Credit Company. Whether that order was made at the time of the examination or a few days afterward, we think immaterial. The appellant corporation was not entitled to notice as to when the court would make an order in a matter theretofore submitted to it. This order made affecting the Law Credit Company contained no statement as to any inadvertence or error having occurred, or as being expressed in the minute order of May 3d. By that minute order Muncey was discharged from the proceeding and the court was without jurisdiction to include him in the order of May 5th. To that extent the latter order should be set aside. The appellant corporation insists that the court was without authority to impose the restraint against it forbidding a transfer of the judgment, assignment of which it had received from Muncey, without requiring security to be given. It is argued that if the law apparently authorizes such an order to be made, it is unconstitutional, as furnishing no adequate process of law under which only a person may be deprived of his property. This position, we think, cannot be maintained. The section of the code (Code Civ. Proc., sec. 720) expressly gives authority for the making of an order such as was made in this case, without requiring security to be given, and this section affecting proceedings of a special nature cannot be read in connection with the law relative to the issuing of injunctions. That the Law Credit Company may suffer any damage is not clear. There is only the bare possibility that by the delay which the order produces, the appellant corporation will fail to discover some property of the defendant Muncey out of which to satisfy the judgment. It is often brought within the range of possibility that through the operation of the law some inconvenience or possible loss may be produced. In our opinion, the restraint authorized to be imposed by the section and which was here imposed is not such as to give support to the argument that constitutional rights of the appellant corporation have been interfered with. We may call attention also to the fact that where an order of restraint is made, if the creditor who obtains such an order fails seasonably to commence an action to have determined the interest of the third party in the property or debt, such third party may apply to the court to have the order vacated.

At the conclusion of respondent's brief we find it suggested that the record in this case is not authenticated in such a way as to authorize this court to consider the papers contained therein. The transcript was prepared, showing the several affidavits and orders made, and by stipulation of counsel it was agreed that the copies therein set forth are true and correct. It has been held that under rule XXIX of the supreme court [160 Cal. lvi, 119 Pac. xiv], the papers and evidence used on the hearing of a motion should be authenticated by being incorporated in a bill of exceptions. It can readily be understood that where oral evidence is heard the court should settle the bill. Here, however, the matters to be considered all appeared in the form of affidavits, on the minutes of the court, or by written order. They were stipulated to be correct by the attorneys, and this, we think, was a sufficient authentication under the provisions of sections 951 and 953 of the Code of Civil Procedure.

The order as to appellant Law Credit Company is affirmed. The order restraining defendant R. E. Muncey from taking action with reference to the judgment assigned by him to the Law Credit Company is reversed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

[Civ. No. 1863. Second Appellate District.—May 26, 1917.]

GEORGE J. BIRKEL COMPANY (a Corporation), Respondent, v. CARRIE A. LOVELL et al., Appellants.

CONDITIONAL SALE—EXECUTION OF CONTRACT—FRAUD—PLEADING—ANSWER—INSUFFICIENT STATEMENT.—In an action to obtain judgment for the unpaid balance due upon a written contract of conditional sale of a piano, the answer is insufficient as a statement of a defense grounded upon fraud, where it is alleged that the contract was signed under "false and fraudulent representations," that its execution was a mere matter of form, but no denial made that it was seen and read over before its execution.

Id.—EVIDENCE—ORAL NEGOTIATIONS—WHEN INADMISSIBLE.—Where no mistake or imperfection in a writing is put in issue by the pleadings, and there is no ambiguity in the writing, or question of construction or interpretation of its terms involved, parol evidence of the oral negotiations which preceded the signing are inadmissible.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Fred H. Taft, Judge.

The facts are stated in the opinion of the court.

Davis & Rush, and John S. Cooper, for Appellants.

E. S. Williams, for Respondent.

CONREY, P. J.—Appeal by the defendants from the judgment and from an order denying their motion for a new trial.

The action is one wherein the plaintiff sued to obtain judgment for the unpaid balance due upon a written contract whereby the plaintiff made a conditional sale of a piano to the defendant Carrie A. Lovell. In the contract it was provided that if the vendee should fail to pay any installment when due, thereupon, at the option of the vendor, all of the contract price then unpaid should become immediately due and payable. Such default did occur, and the vendor exercised said option and commenced this action. By their answer the defendants denied that the defendant Carrie A. Lovell at the time mentioned executed or delivered to the plaintiff her contract in writing, a copy of which is attached to the complaint. This denial was followed by the allegation of facts concerning the oral negotiations which preceded the signing of the written contract. These facts are of such a nature that they could not be proved without contradicting the terms of the writing. The answer alleged "that pursuant to these conditions, and no other, the defendant Carrie A. Lovell agreed to take the piano, and that at the time she took the said piano she signed an agreement under false and fraudulent representations to her that it was a mere matter of form to sign and execute a contract, and that upon the further promises and representations to her that she would in no way be bound under said contract," etc.

At the trial Mrs. Lovell admitted that she signed the contract, and did not deny that she had seen and read it over before signing. In her answer to the complaint she did not allege any facts showing that she did not read the contract before signing, or that in signing it she relied upon any representations made to her that the writing was in terms other than those which are actually expressed therein. Although

the answer characterizes the statements of the plaintiff as "false and fraudulent representations," the facts set forth concerning those representations do not constitute a defense. For all of her assertions that "a course of cunning, deceit, and fraud" was pursued by the plaintiff, are qualified by the admission that she voluntarily signed a written contract with knowledge of the terms therein plainly and distinctly stated.

Appellants have presented many specifications of error in rulings whereby the court excluded testimony offered by them. By many of these rulings the court sustained objections to questions asked on cross-examination of the witness Geissler, who made the sale on behalf of the plaintiff to Mrs. Lovell. The subject matter of these questions was outside the scope of the testimony of the witness on direct examination. In asking such questions counsel for appellants were attempting to present their affirmative defense prematurely.

The only witnesses on behalf of the defendants were Mrs. Lovell herself and the witness Geissler. Many questions were asked of these witnesses which were of a character similar to those before mentioned, and these questions also were excluded by the court principally upon the ground that they were offered for the purpose of proving negotiations which preceded the written contract, and for the purpose of attempting to change, vary, or alter the terms of such written contract by parol evidence. These were correct rulings. Section 1856 of the Code of Civil Procedure specifies the instances in which a court may receive evidence of the terms of an agreement other than the contents of the writing when the terms of such agreement have been reduced to writing. The evidence offered by the defendants did not come within the provisions of that section. No mistake or imperfection of the writing was put in issue by the pleadings. There was no ambiguity in the terms of the writing. No question of construction or interpretation of the terms of the writing was involved in the case. (See, also, sec. 1625, Civ. Code.) The validity of the agreement as made was not a fact in dispute, except to the extent that the answer may be considered as an attempt to establish illegality in the contract or fraud in the obtaining thereof. And for the reasons already stated, the answer was insufficient as a statement of a defense grounded upon fraud.

The judgment and order are affirmed.

James, J., and Works, J., *pro tem.*, concurred.

[Civ. No. 1942. Second Appellate District.—May 28, 1917.]

F. A. PRESTON, Respondent, *v.* **J. M. DUNN**, Appellant.

ACTION FOR Goods SOLD—PAYMENT—ISSUE—FINDING.—In an action for goods sold and delivered, where the complaint fails to allege that the defendant agreed to pay the alleged reasonable value of the goods, and the answer affirmatively alleges that the goods were sold for an agreed price, the defendant is entitled to a finding on that issue, and a finding that plaintiff's claim is due "upon an open book account" is not sufficient.

ID.—EVIDENCE — ERROEONS ADMISSION OF LEDGER — ADMISSIONS—ERROR CURED.—In an action for goods sold and delivered, error in admitting in evidence a ledger purporting to show the account, is not prejudicial, where the sale and delivery of the goods were admitted, and the reasonable value of the goods proved to be the same as the sum charged.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge.

The facts are stated in the opinion of the court.

Gray & Bittleston, and Ben F. Gray, for Appellant.

Humphrey Marshall, and Frederick A. Preston, for Respondent.

CONREY, P. J.—The defendant appeals from the judgment which was rendered for the amount demanded in the complaint. The (fourth amended) complaint alleged that plaintiff's assignor sold and delivered to the defendant at his special instance and request certain goods reasonably worth a certain stated amount; that the defendant has failed and refused to pay said amount, except a sum for which credit is given; that there is due, owing, and unpaid from defendant to plaintiff upon an open book account of said goods a balance of \$386.54. The answer denied the allegations of the complaint and for further answer alleged that the defendant entered into a verbal agreement with the plaintiff's assignor, under which said assignor agreed to sell and deliver to defendant a well outfit complete for the sum of \$310; that defendant paid on said contract the sum of three hundred dollars, and admits

that the remaining \$10 has not been paid. The bill of particulars furnished by the plaintiff and taken from the assignor's ledger shows that the amount charged for the items which the defendant includes in the alleged \$310 contract was \$95, plus \$490.71. This difference in their contentions constitutes the real subject matter of the controversy. The court in its findings of fact stated that said assignor "sold and delivered to defendant at his special instance and request, on an open book account thereof, certain goods, wares, and merchandise, more particularly set forth in the bill of particulars on file in this action"; that said goods were reasonably worth the sum stated in the complaint; that there is due, owing, and unpaid from defendant to plaintiff "upon said open book account of said goods, wares, and merchandise, a balance amounting to the sum of \$386.54."

There was in the answer a plea of the statute of limitations and a denial of the assignment of the claim to plaintiff, and these defenses are mentioned in the briefs. But at the oral argument the court was informed by counsel that appellant does not now question the assignment and does not insist upon the statute of limitations as a defense. We will discuss the remaining questions presented.

It is contended that the court failed to make any finding upon the stated defense that the goods constituting the well outfit were sold for an agreed price; whereas the evidence shows that they were sold for an agreed price and not for their "reasonable value." If we may assume that the court did find that they were sold for their reasonable value and not for a specified agreed price, we are satisfied that the finding is sustained by the evidence; for although the defendant testified to facts showing the contract as alleged by him, his testimony was denied by the witness who, as agent of plaintiff's assignor, made the sale. The testimony of that agent also affirmatively shows that the goods were sold and delivered in the following manner, viz.: That the witness quoted to the defendant the said prices of \$95 and \$490.71, and that after receiving the said quoted prices the defendant ordered the goods. Also that the items charged were made in regular transactions of business with the defendant, and the goods sold and delivered to him and the charges made on the books as they are shown in the bill of particulars; that said prices were agreed upon. Fur-

ther he testified that the said prices were the reasonable value of the articles furnished.

The findings of fact fully include and support the allegations of the complaint to the effect that the goods were sold and delivered to the defendant and were of the reasonable value stated. This finding, together with the finding that the amount stated was due to the plaintiff upon an open book account, would be sufficient to support the judgment, since those facts, together with the findings upon other facts not now in dispute, covered all of the allegations of the complaint and the complaint stated a cause of action. But the complaint did not allege, and the court did not find in terms, that the defendant agreed to pay for those goods the reasonable value thereof. The defendant had affirmatively alleged that the disputed items were sold to him upon an agreed price of \$310. Notwithstanding that the items were worth more money, the sale might have been for the smaller sum of \$310. The defendant was entitled to a finding upon this issue, for if it were determined in his favor, his defense would be sustained. The finding that the amount of the balance claimed by plaintiff is due "upon an open book account" amounts to nothing more than a finding that the vendor of the goods kept a book of account in which it made its charges against the defendant, and that it made those charges in sums which were the reasonable value of the goods sold.

It is further claimed that the court should have sustained defendant's objection to the book of account which was received in evidence. The objection was based upon the fact that the book offered was merely a ledger which did not contain the original charges and was not the best evidence. The defendant admitted that all of the goods were sold to him as claimed by the plaintiff. The entire controversy relates to the amount payable therefor. The defendant admitted that the bill of particulars was correct to the extent that it was a true copy of the account as it appeared in the ledger; the admission did not go far enough to consent to the reception of the ledger itself. The bookkeeper testified that the ledger items were taken from a cash-book and cost sheets. We need not consider the cash-book, since it is admitted that the payments made on account were correctly credited. The question then is whether the ledger was properly admitted, when the cost sheets might have been produced as the primary and best

evidence. The bookkeeper said in substance: "These items charged in the ledger are taken from slips handed me by the cost clerk. As the work goes on the workmen turn in their records and we take them from those slips. These items are correctly taken from the charges made on the slips showing actual time and valuation of materials furnished. But I do not know whether the statements themselves are correct. I entered from the cost sheet into the ledger and it is a copy of the cost sheet." The salesman testified that when the goods were sold (referring to the \$490.71 item), he placed the order in a book. "That book has been destroyed. It was kept by our trustee for a year afterward. Thinking no question about it, we closed our office." On cross-examination by defendant's counsel, he further testified that the figures which he had written in that book showed the price as made to Mr. Dunn, "the same as was copied on the cost sheet." The facts thus shown in evidence were not sufficient to constitute the foundation necessary to authorize the admission of the ledger. (*San Francisco Teaming Co. v. Gray*, 11 Cal. App. 314, 320, [104 Pac. 999]; *Chandler v. Robinett*, 21 Cal. App. 333, [131 Pac. 891]; *Chan Kiu Sing v. Gordon*, 171 Cal. 28, [151 Pac. 657]; *Montgomery & Mullen Lumber Co. v. Ocean Park Scenic Ry. Co.*, 32 Cal. App. 32, [161 Pac. 1171]). But as the sale and delivery of the goods were admitted, and the reasonable value of the goods was proved to be the same as the sum charged, the error was not prejudicial. It might have been important with respect to the plea of the statute of limitations. (Code Civ. Proc., sec. 339, subd. 1.) The section pleaded refers to the two-year period of limitations. An open book account may be sued upon at any time within four years. (Code Civ. Proc., sec. 337, subd. 1.) But as we have stated, that defense has been waived on this appeal; and even if otherwise good, it could not have been sustained, since the record before us does not show the date of commencement of the action.

By reason of the court's failure to find upon the affirmative defense above noted, the judgment is reversed.

James, J., and Shaw, J., concurred.

[Crim. No. 543. Second Appellate District.—May 28, 1917.]

In the Matter of DAVID BRODIE, a Person Under Twenty-one Years of Age.

JUVENILE ACT—COMMITMENT WITHOUT JURY TRIAL—CONSTITUTIONALITY OF ACT.—Under the Juvenile Act, no infringement of constitutional rights is worked because the accused is not given a right to trial by jury, as the orders of commitment in such cases are not for the purpose of inflicting punishment, but to provide suitable guardianship, either by individuals or under the official supervision of the superintendents of state schools.

Id.—DEPRIVATION OF CUSTODY OF MINOR—FINDINGS ESSENTIAL.—In view of the provisions of section 9b of the Juvenile Act, it is essential to sustain a valid order of commitment, where a minor is taken from the custody of a parent or guardian, that a finding be made that the welfare of the minor requires the taking away of such custody.

APPEAL from a judgment of the Superior Court of Los Angeles County. Sidney N. Reeve, Judge.

The facts are stated in the opinion of the court.

Joseph W. Mowell, for Appellant.

U. S. Webb, Attorney-General, and Robert M. Clarke, Deputy Attorney-General, for Respondent.

JAMES, J.—This is an appeal taken on behalf of David Brodie, who was by the judge of the juvenile court of Los Angeles County declared to be a ward of that court and ordered committed to the Preston School of Industry, at Ione, until he should become twenty-one years of age. The minor at the time the order was made in February, 1917, was of the age of sixteen years. The complete record of the testimony heard, together with the various orders and findings of the court, are brought up under the alternative method of appeal. It appears that a petition was filed, the purpose being to have the minor declared a ward of the juvenile court, in which one or more misdemeanors were alleged to have been committed by the young man complained against. A hearing was had after notice to and in the presence of the mother, the natural

guardian of the accused. The court questioned the minor, who admitted the truth of the charges made against him. His mother, with whom he resided, stated that he had always been of good habits about home and, excepting for the irregularities mentioned in the petition and which had been committed after association with certain other boys, no cause for complaint had arisen. It was shown that the boy had spent a part of two years in the high school of Los Angeles, and that he had been employed with a certain firm, a member of which expressed himself as being well pleased with the demeanor of the boy and his work while in that employment. It was stated to the judge that on behalf of the mother, evidence could be offered to show that the boy would be furnished steady employment. The report of the probation officer fully sustained all of the assertions made by the boy and his mother as to the previous good character and industrious habits of the young man. The mother desired to retain the custody of the boy, but the court having theretofore committed two other boys concerned in the same transactions to the Preston School, declared that he did not believe any difference should be made as between the boys in their treatment, and consequently required that Brodie be committed to the Preston School.

On this appeal, among other contentions, it is urged that the Juvenile Act provides a procedure criminal in its nature by which a minor may not be committed to a state institution without being accorded a jury trial. Acts by various of the legislatures in the different states have been passed, having for their object the humanitarian purpose of providing a procedure by which incorrigible minors or those committing crime might be saved from the stigma of conviction and placed under probation with individuals or in institutions where they would receive corrective care and training in useful trades or occupations. These acts have always been sustained, and the summary procedure therein provided for approved as not being a procedure which would effect a criminal conviction, but rather one providing guardianship. Under this construction it has been repeatedly held that no infringement of constitutional rights was worked because the accused was not given a right to trial by jury—that orders of commitment in such cases were not for the purpose of inflicting punishment, but for the purpose of providing suitable guardianship, either by individuals or under the official

supervision of the superintendents of state schools. We think it unnecessary to cite authorities to this point, for the proposition declared has been thoroughly established in a number of the states where such laws have been tested by appeal and otherwise.

Another of the points advanced on behalf of appellant is, to our minds, of sufficient gravity to justify a reversal of the judgment. The Juvenile Act provides that it shall be made to apply to certain persons under the age of twenty-one years. A description of such persons is found in thirteen subdivisions which immediately follow. Subdivision 13 declares that a person within the age mentioned, "who violates any law of this state or any ordinance of any town, city, county, or city and county of this state defining crime," shall be subject to the provisions of the act. Procedure for the issuance of a citation to the parent and guardian, requiring the production of a minor complained against, follows. A hearing is provided to be had and authority is given to the judge of the juvenile court to declare a minor complained against to be a ward of the court. Section 8 of the act provides that when a person is so adjudged to be such ward, he may be committed to a home or to some reputable person, society, or corporation, or to the care of a probation officer. Subdivision "e" of section 8 provides that the court may, if the ward be a boy and over the age of sixteen years, commit him to the Preston School of Industry for the period of his minority. It is further provided that in lieu of such commitment, the court may admonish the person and dismiss the petition. Section 9b of the act provides as follows: "No ward of the juvenile court as defined in this act shall be taken from the custody of his parent or legal guardian, without the consent of such parent or guardian unless the court shall find such parent or guardian to be incapable of providing or to have failed or neglected to provide proper maintenance, training and education for said person; or unless said person has been tried on probation in said custody and has failed to reform, or unless said person has been convicted of crime by a jury, or unless the court shall find that the welfare of said person requires that his custody be taken from said parent or guardian."

It will be noted by the provisions of this section that where the parent or guardian of a minor is deprived of his or her

custody, certain findings must be made by the juvenile court. It is complained on this appeal that the court made no finding sufficient to satisfy either of the conditions enumerated in the section, and we think that the appellant is correct in that assertion. We have examined the record diligently, which covers the entire proceedings, both as to the documents filed, the records prepared, and testimony heard. As we view the provisions of the act, it is essential that the court make such findings as are required by section 9b and in writing. In section 16 of the same act it is provided: "The orders and findings, if any, of the superior court in all cases coming under the provisions of this act, shall be entered in a suitable book or books or other form of written record, to be kept for that purpose, and known as the 'juvenile court record,' and the court, when acting under this act, shall be called the 'juvenile court.' " The attorney-general concedes that if the proceeding under the Juvenile Act is to be regarded as criminal and the commitment of the minor is to be regarded as punishment for an offense, then there would be no escape from the first proposition made by appellant that the constitutional right to a trial by jury would be violated. However, the attorney-general's position (to which we agree) is that a formal guardianship by the state is provided for only. That being the true construction, the provisions of section 9b above quoted are harmonious to that end. In other words, there would be no excuse or reason for depriving a natural guardian, capable, able, and willing to train, care for, and educate the minor, of the custody of the minor, unless the court should determine that the welfare of the person required that his custody be taken away from the parent or guardian. The making of such a finding, we think, was essential to sustain a valid order of commitment, and that because of its absence the judgment should be reversed.

The judgment is reversed and the matter remanded to the juvenile court for rehearing.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1639. Third Appellate District.—May 28, 1917.]

VICTOR BOOS, Respondent, v. R. R. BYRNES, Appellant.

APPEAL FROM JUDGMENT—RECORD—UNAUTHENTICATED AFFIDAVITS.—

Upon an appeal taken from a judgment for the purpose of reviewing an order denying a motion to set it aside, on the ground that no notice of the filing of the findings or of the time when the findings would be presented to the judge was served upon the appellant, affidavits in the clerk's transcript, which were filed on the motion to strike out the judgment, cannot be considered, where they were not certified or otherwise authenticated by the judge as having been used at the hearing of the motion.

ID.—ORDER DENYING MOTION TO VACATE JUDGMENT—APPEALABLE ORDER.—An order denying a motion to set aside and vacate a judgment is itself an appealable order, and cannot be reviewed upon appeal from the judgment.

APPEAL from a judgment of the Superior Court of Mendocino County. J. Q. White, Judge.

The facts are stated in the opinion of the court.

Charles Kasch, for Appellant.

Robert Duncan, for Respondent.

CHIPMAN, P. J.—Action in replevin to recover possession of a certain automobile. Defendant justified the taking as sheriff under execution issued in an action entitled *Mary Lazarus v. Simon Boos*, alleging that said automobile is the property of said judgment debtor.

The cause was tried by the court without a jury and the court made and entered findings and judgment for plaintiff, on December 7, 1916. On December 12, 1916, defendant served and filed notice of a motion to set aside and vacate said findings and judgment on the ground that no notice of the filing of said findings or of the time when said findings would be presented to the judge of said court was served upon defendant, and that defendant did not waive notice of the time when said findings would be presented. The time for hearing said motion was shortened and order made that it be heard December 13, 1916. We do not find in the record

any order denying the motion, but plaintiff seems to treat the motion as having been denied.

On December 13, 1916, defendant served and filed notice of appeal from the judgment of December 7, 1916, and now seeks to review the action of the court in denying said motion. Respondent objects on two grounds, both of which are well taken and preclude our considering the order: First, the affidavits in the clerk's transcript, which were filed on the motion to strike out the judgment, cannot be considered upon this appeal, because they were not certified or otherwise authenticated by the judge of the court as having been used at the hearing of said motion. (*Thompson v. American Fruit Co.*, 21 Cal. App. 338, [131 Pac. 878]; *Pouchan v. Godeau*, 21 Cal. App. 365, [131 Pac. 879]; *Russell v. Chisholm*, 23 Cal. App. 727, [139 Pac. 657].) Second, the said order is itself an appealable order, and cannot be reviewed upon appeal from the judgment. (Code Civ. Proc., secs. 956, 963; *McCourtney v. Fortune*, 42 Cal. 387; *Deyoe v. Superior Court*, 140 Cal. 476, 486, [98 Am. St. Rep. 73, 74 Pac. 28]; *Bohn v. Bohn*, 164 Cal. 532, 537, [129 Pac. 981].)

The remaining point urged by appellant is that the evidence does not support the finding and judgment allowing plaintiff \$50 damages for the detention of the automobile. Appellant quotes some testimony from which he concludes that \$37.50 is the extreme amount shown as damages. There was other testimony in the case fully warranting the finding.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1614. Third Appellate District.—May 28, 1917.]

A. W. FISSEL et al., Respondents, v. J. W. MONROE, Appellant.

FRAUDULENT CONVEYANCES—TRANSFER OF RIGHT TO PLANT CROP—CHANGE OF POSSESSION—CODE SECTION INAPPLICABLE.—Where the owner of a leasehold interest in a tract of land makes a transfer to his sons of the right to plant a crop of barley on the land, and the sons go into possession and continue in possession of the land

until after the crop is harvested, the transfer is not presumptively void as to creditors of the lessee under section 3440 of the Civil Code, which provides that every transfer of personal property is conclusively presumed to be fraudulent, as against the creditors of the transferrer, unless accompanied by an immediate delivery and followed by an actual and continued change of possession.

APPEAL from a judgment of the Superior Court of Yolo County. W. A. Anderson, Judge.

The facts are stated in the opinion of the court.

E. E. Gaddis, for Appellant.

Arthur C. Huston, and Harry L. Huston, for Respondents.

CHIPMAN, P. J.—The first paragraph of the verified complaint is as follows: "That on the twenty-fourth day of July, 1915, at and in the county of Yolo, state of California, plaintiffs were the owners and in the possession and, at the time of the filing of this complaint, are the owners of the following described goods and chattels, of the value of seven hundred dollars, to wit: 640 sacks of barley." It is then alleged that defendant wrongfully took said goods from the possession of plaintiffs; that demand was made of defendant for the possession thereof, which was refused, and that plaintiffs are damaged in the sum of seven hundred dollars.

Defendant answered: "1. That as to the allegations of paragraph 1 of said complaint, this defendant has no information or belief upon the subject sufficient to enable him to answer the same, and placing his denial upon that ground, denies generally and specifically each and all and every of the allegations therein contained." He denied that he "wrongfully took" said or any sacks of barley from the possession of plaintiffs, denied that plaintiffs made any demand for the possession thereof, and denied that defendant refused to deliver possession thereof; the allegation as to damage was also denied.

The court found "that all of the allegations of the complaint are true" and "that all of the allegations of the answer are untrue." Judgment was entered in favor of plaintiffs for seven hundred dollars, from which defendant prosecutes this appeal.

While it does not appear from the pleadings, reference is made in the record to the fact that defendant is sheriff of

Yolo County, and that his possession and subsequent sale of the barley were by virtue of a writ of attachment issued in an action in which D. A. Curtin was plaintiff and E. L. Fissel, the father of plaintiffs, was defendant.

It is stated in appellant's brief that the principal point urged on the appeal "is as to the insufficiency of the evidence to sustain the decision." The transfer of the barley in question from E. L. Fissel to the plaintiffs, as will be hereinafter specifically set forth, is claimed to have been presumptively fraudulent, because not accompanied by an immediate delivery and was not followed by an actual and continued change of possession, as required by section 3440 of the Civil Code.

Preliminarily, respondents raise the point that plaintiffs' ownership, as alleged in paragraph 1 of the complaint, must be held not to be denied. As to this they say: "If the defendant claimed to be the owner, he could not deny ownership in the plaintiffs for want of information"; citing *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, [105 Pac. 130].

For four or five years prior to the transaction involved herein, which occurred in 1915, E. L. Fissel, his wife, and their two sons, respondents herein, were living on a tract of land called the Ludden place, which the father had leased from the owner. He was also, under a verbal lease from year to year, farming a piece of land known as the Elmore place, the two tracts being in close proximity to each other, the rental for the Elmore place being one-third of the crop raised. About March 2 or 3, 1915, the father, E. L. Fissel, was sick at his home on the Ludden place. The respondents and Sherman Hiddleson and J. T. Young, two employees of Mr. Fissel, Sr., were in the bedroom where the father was lying. As to the conversation occurring there, A. W. Fissel testified: "My father said he couldn't do any more, he was too sick, and for me to go ahead and put the crop in, I and my brother, and settle the bills that was against the crop, and if there was anything left, why, it was to be mine and my brother's. Q. Well, did he say what ranch? A. He said the Elmore ranch." C. R. Fissel testified: "My father just told us to go ahead and put in the crop and we could have it." J. T. Young's version of the conversation was that "Mr. Fissel . . . told the two sons if they took the Ludden—or the Elmore place and put the crop in it was theirs, for paying the bills against the crop, and the boys said they would take it." The

witness Hiddleston said: "I went in there to see him and they was talking about the crop, and he told the boys if they would take the Elmore ranch and put in the crop and pay the bills, they could have what they made."

Pursuant to the above detailed conversation, plaintiffs plowed the balance of the land, about half of it having been theretofore plowed by the elder Fissel; they sowed and cultivated the grain and harvested the crop.

The position taken by appellant is that the plowing by the father of 50 acres (the entire field being one hundred acres) was of the value of \$1.50 per acre, or \$75; that this constituted personal property, and was the leasehold interest of E. L. Fissel; and that the transfer of this leasehold interest was without consideration. (Citing *Jeffers v. Easton, Eldridge & Co.*, 113 Cal. 345, 352, [45 Pac. 680]; *Commercial Bank v. Pritchard*, 126 Cal. 606, [59 Pac. 130]; *Barnum v. Cochrane*, 143 Cal. 642, 645, [77 Pac. 656].) Respondents contend that there was no transfer of any leasehold interest, the transaction being nothing more than a mere cropping contract. (Citing *Walls v. Preston*, 25 Cal. 60, 64.)

The testimony relied upon by appellant as bringing the case within the purview of section 3440 of the Civil Code is stated by him substantially as follows: The barley seized by appellant was raised on the Elmore place in 1915. Albert W. Fissel, then twenty-five years of age, was unmarried, and had lived with his parents since attaining his majority, about six years. He owned one horse, a couple of mules (which were not work animals in 1915), some carpenter tools and farm implements, consisting of a four-gang plow. C. R. Fissel was twenty-three years of age and was also unmarried. He owned one mule, three years old, that had never been worked. He had no money in bank, nor had his brother, as far as he knew. The feed for the animals used in plowing the balance of the field, as well as the animals themselves and all implements used, were furnished by E. L. Fissel from the Ludden place, and the teams and men employed in the work were boarded by him. Appellants boarded with their parents; the mother did the cooking and the father purchased the groceries. Appellant states that the sacks in which the barley was placed were purchased by the father, but A. W. Fissel testified that he paid \$40 and owed \$35 for them, and that he had a settlement with the man from whom he bought the sacks.

At the time of the purported transfer the father was indebted in divers sums of money of no considerable amount.

Respondents' position is that the only thing transferred to them by their father was the right to plant a crop of barley; that the property in question was not in existence at the time of the transfer, and, therefore, the transfer does not fall within the provisions of said section 3440; that there could be no immediate delivery and no actual and continued change of possession of that which was not yet in being.

There was evidence that plaintiffs did the necessary plowing of the land with a tractor, for the hire of which they paid; they also hired the harvesting and threshing done and paid for it, both of them assisting in the work; they hauled the barley to the warehouse, setting apart the rentals and marking the sacks with the name of the owner of the land. With the exception of the fifty acres plowed by their father, which was replowed by plaintiffs, substantially all the cost of producing the crop was borne by plaintiffs. The seed used was in the granary taken from the Elmore place, and plaintiffs replaced it out of the crop raised by them.

Defendant made no claim of ownership in himself or any other person, and it is very doubtful whether, under the form of his answer, there was a sufficient denial of the averments of the verified complaint alleging ownership of the barley in plaintiffs. However, the facts constituting the basis of plaintiffs' claim of ownership were all brought out by plaintiffs, apparently disregarding their objection that the issue of ownership was not raised by the pleadings. Actual fraud was not alleged by defendant, and at the trial defendant's counsel expressly disclaimed that actual fraud in any way tainted the transaction. Neither did defendant in his answer deny the taking otherwise than by denying that he "unlawfully took" possession of the barley. Nor did he by his answer justify the taking as sheriff or otherwise. The fact that he did take possession, after the barley was harvested, under a writ of attachment at the suit of a creditor of plaintiffs' father and sold the barley under execution in that suit was brought out by plaintiffs in establishing their case, defendant objecting and contending that as he sued as an individual, evidence that he acted in his official capacity as sheriff was immaterial, irrelevant, and incompetent. In his cross-examination of plaintiffs' witnesses, who testified to what occurred between

the father and his sons when the transaction was entered into, defendant sought to show that it was colorable and void as to creditors, under section 3440 of the Civil Code, and in the course of the examination the relation of the parties and the circumstances, above referred to, surrounding the transaction were developed over plaintiffs' objection that neither actual nor presumptive fraud could be shown under the pleadings.

The court seems to have entertained some doubt as to the correctness of the theories respectively advanced by the parties and allowed all the evidence to go in, subject to a ruling to be made at the argument of the case. No ruling was made, and the record contains no intimation of the court's opinion other than as found in its omnibus finding "that all of the allegations of the complaint are true and all the allegations of the answer are untrue." In *Raymond v. Glover*, 122 Cal. 471, 476, [55 Pac. 398, 400], the trial court failed to pass upon the admissibility of certain evidence which was taken subject to a subsequent ruling as to such admissibility. It was pointed out that the supreme court "has repeatedly discouraged the practice of deferring rulings upon the admissibility of proffered evidence, but that to do so is not necessarily erroneous." The court, however, held that the failure to rule was error in that case, because the objecting party was deprived of an opportunity to rebut the evidence that had been received under objection. In the present case, all the evidence upon which defendant relied was admitted and was before the court, and if the finding of the court has support in the evidence, we cannot see that there was prejudicial error in the court's failure to announce its ruling on certain evidence.

Fissel, Senior, had the undoubted right to transfer to his sons, plaintiffs, the privilege of cropping the Elmore place subject to the terms of his lease, and unless he was at the time insolvent or contemplated insolvency, of which there is neither evidence nor claim made by defendant, he could do this voluntarily and without a valuable consideration. (Civ. Code, sec. 3442.) Defendant relies wholly upon the claim that the transfer was presumptively fraudulent under section 3440 of the Civil Code, which provides as follows: "Every transfer of personal property . . . is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery,

and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession," etc. We are unable to see how this section of the Civil Code can be made applicable to the facts in this case. E. L. Fissel transferred nothing to plaintiffs but the right to crop the land, and so far as that part of the transaction is concerned, the plaintiffs went into immediate actual possession, and continued in actual and exclusive possession until after the barley was harvested and until it was taken into plaintiffs' possession. The property now in question was not in existence when the transfer of the right to crop the land was made, and, of course, was not, and could not then be, in the possession of the transerrer. For like reason there could be no actual and continued change of possession of this non-existent property. Plaintiffs took the land early in the season of 1915, prepared it for seeding by their own labor, seeded it, and afterward harvested the grain,—all at their own cost and expense. The property involved had not even a potential existence, and constituted no part of anything transferred to plaintiffs.

It was held in *O'Brien v. Ballou*, 116 Cal. 318, [48 Pac. 130], where a growing crop of wheat was sold, that "growing crops are chattels not susceptible of delivery until harvested, and are not 'in the possession or under the control of the vendor' within the meaning of the statute requiring an immediate delivery and continued change of possession. (*Davis v. McFarlane*, 37 Cal. 634, [99 Am. Dec. 340].). When the crop was harvested, it was the duty of plaintiff to take immediate possession of the grain and to retain such possession." This was done by plaintiff in that case, and the contract of sale was held "not void under the statute of frauds."

We attach no importance to such facts as that plaintiffs were allowed to live with their father while putting in and harvesting the crop; that they had but little money, and that they used some of the farm implements and work animals that were on the Ludden place. The evidence was that plaintiffs' father had nothing to do with making the crop; that plaintiffs, through their own labor and resources and the credit they enjoyed in the neighborhood, had no difficulty in producing the crop and meeting their obligations without the aid of their father. We think that the evidence was sufficient

to support the finding that plaintiffs are the owners of the property in question unaffected by the claims of any creditors of E. L. Fissel, plaintiffs' vendor.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 2027. First Appellate District.—May 29, 1917.]

**VULCAN FIRE INSURANCE COMPANY (a Corporation),
Appellant, v. H. P. JORGENSEN, Respondent.**

CORPORATION — FRAUDULENT PROCUREMENT OF STOCK SUBSCRIPTION—RESCISSON—PECUNIARY DAMAGE.—In an action by a corporation to recover an alleged balance due on a subscription for certain shares of its capital stock, where the defendant set up that his subscription was procured upon the false representation that a bank president, upon whose integrity and business capacity the defendant placed special reliance, was connected with the corporation, and sought rescission of the contract and recovery of the money paid, it is not necessary to aver or prove pecuniary damage.

Id.—PROMPTNESS OF RESCSSION—EVIDENCE.—The prompt rescission of a stock subscription contract is shown by evidence that immediately upon the discovery of the falsity of the representations, and within eight days of the making of the contract, the subscriber wrote to the president of the corporation repudiating the contract.

Id.—SUFFICIENCY OF NOTICE OF RESCSSION.—In making rescission of such a contract, it is sufficient to state that the reason for the action was that the subscription had been obtained by misrepresentation on the part of the corporation's agent, without enumerating the misrepresentations specifically.

Id.—RETURN OF STOCK UNNECESSARY.—Where a corporation merely undertakes to issue a certain number of shares of its stock upon the payment of the balance of the purchase price, there is nothing for the purchaser to return in making a rescission of the contract.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. Wm. S. Wells, Judge.

The facts are stated in the opinion of the court.

Otto Irving Wise, for Appellant.

Peck, Bunker & Cole, and Henry C. McPike, for Respondent.

LENNON, P. J.—In an action to recover the balance due from the defendant upon a subscription to stock in the plaintiff corporation, the defendant denied liability, and in a cross-complaint averred that he had rescinded his contract of subscription sued upon because of certain fraudulent representations of the plaintiff's agent by which it was induced, and prayed judgment for the recovery of the amount paid by him upon said subscription. The court rendered judgment in defendant's favor, and granted him the relief sought by his cross-complaint, basing its judgment upon findings, among others, as follows:

"In procuring said subscription the plaintiff was represented by and acted entirely through one J. B. Harper. . . . On said last-named day said J. B. Harper . . . went to the ranch and home of the defendant in the county of Merced . . . and as an inducement to defendant to subscribe for said capital stock stated to defendant as follows:

"That one J. F. Carlson, the president of the Central National Bank, in the city of Oakland, had given to said Harper, as the agent and representative of plaintiff, a letter directed to defendant, advising the defendant to become a purchaser and subscriber for capital stock in Vulcan Fire Insurance Company, plaintiff herein, and that by some oversight he, the said Harper, had left said letter in his hotel, and that said J. F. Carlson was very angry with said Harper because he had not before solicited the subscription of defendant.

"That said Carlson was going to quit his position with said Central National Bank in Oakland within six months and take complete and active charge of the business of plaintiff and do nothing else; that said Carlson was head of plaintiff at that present time, but was not willing the general public should know about it, and that in accordance with the directions of said Carlson he, said Harper, had come to obtain defendant's subscription to said stock.

"At the time of the making of the aforesaid statement and representations, said J. B. Harper well knew that said defendant placed great reliance upon the business sagacity of said

J. F. Carlson and in his judgment as a business man, and also held the said J. F. Carlson in high esteem as a friend, and if defendant could be induced to believe that said Carlson had given a letter to Harper directed to defendant, advising defendant to subscribe for capital stock in said plaintiff corporation, and that said Carlson was anxious for defendant to do so, and was angry with said Harper because he had not before that time solicited said subscription from defendant, and that said Carlson was going to quit his position with said Central National Bank within six months and take complete and active charge of the business of plaintiff and do nothing else, and that said Carlson was at the head of plaintiff at that present time but was not willing the general public should know about it, and that in accordance with the directions of said Carlson Harper had come to obtain defendant's subscription for said stock, said defendant would subscribe for the same; and the said statements and representations were so made by the said Harper with the design and for the purpose of obtaining from said defendant said subscription.

"The said defendant believed the said statements . . . and relied upon the said statements and all of them, and believing the same and relying upon them, the said defendant then and there paid to the said Harper, as agent and representative of plaintiff, the sum of \$750, being \$5 per share upon 150 shares of the capital stock of plaintiff, for which said defendant then and there subscribed and agreed to pay to plaintiff the further sum of three thousand dollars, the balance of said subscription price.

"The said statements hereinabove referred to . . . were and each of them was false and untrue, and the said Harper . . . well knew that the same and each of them was false and untrue, and he well knew that the said defendant believed the said statements to be true and that he relied upon them and each of them as being true, and was induced by them and each of them to pay the said sum of money . . . to plaintiff, and became a subscriber for said 150 shares of stock, believing and relying upon the said statements, and there was no other inducement to the said defendant than as hereinabove stated to become the subscriber for said stock, and each and all of said representations were untrue and were material, and without the said statements and representations so made to the defendant, said defendant would not have paid to said

Harper for plaintiff or to the plaintiff said sum of \$750, or become a subscriber for said capital stock."

The court also found that the defendant, upon discovering the falsity of the representations, promptly rescinded his subscription, and, having reference to the duty of one seeking to rescind a contract, to return to the other party to it anything received under it, found that the defendant had received nothing.

In urging a reversal of the judgment and order denying its motion for a new trial, the plaintiff makes several contentions, viz., (1) that the record contains no allegation, evidence, or finding that the cross-complainant was in any way pecuniarily damaged by the alleged false representations; (2) that he failed to rescind promptly upon discovery of the facts entitling him to rescind; (3) that the notice of rescission by the cross-complainant was insufficient for various reasons, but chiefly because it failed to state the grounds upon which the right was attempted to be exercised; (4) that the defendant lost his right to rescind because he did not offer to return whatever of value he had received, and (5) errors of law in the admission of certain testimony.

(1) Addressing ourselves to the first of these contentions, in an action such as this, where the defendant and cross-complainant merely recites the payment of his subscription and asks for its rescission, an allegation or proof of pecuniary damage sustained by him is not necessary. The author of Cook on Corporations, speaking of the rescission of a subscription to corporate stock, says:

"It is the duty and right of directors, without waiting for a bill in equity or other legal proceedings, to revoke a subscription contract, and remove from the stockholders' list the name of a subscriber who reasonably proves that he was induced to subscribe by fraudulent representations chargeable to the corporations and who requests a rescission of the subscription. . . . Where, upon such a demand being made by a subscriber, the directors refuse to dissolve the subscription contract, the subscriber need not always resort to a bill in equity to have the contract set aside for fraud. A mere notification to the corporation is generally sufficient.

"§ 154. The most common remedy of a subscriber induced by fraud to subscribe is to wait until the corporation brings suit to collect the subscriptions, and then to set up the fraud

as a defense. Nearly all of the cases in this country are cases where this remedy has been adopted . . . " (1 Cook on Corporations, secs. 153, 154, p. 422.)

That such misrepresentations as are complained of in the case at bar are sufficient to entitle the subscriber to rescind, without proof of pecuniary damage suffered, is well settled. At section 145 (page 410) of the work just referred to the author says: "Any false statement by the authorized agents of a corporation in regard to the past or present status of the corporate enterprise or material matters connected therewith, whereby subscriptions are obtained, is a fraudulent representation. Thus, a false statement that . . . certain individuals are directors . . . have been held to constitute a fraudulent representation entitling the subscriber induced thereby to subscribe to the remedies provided for him by law in such cases . . . " (citing *Blake's Case*, 34 Beav. 639, [55 Eng. Reprint, 782]; *Munster's Case*, 14 W. R. 957; *In re Metropolitan etc. Assn.*, 64 L. T. 561; *Ex parte Brown*, 95 L. T. 756).

The rule announced was followed in the case of *Coles v. Kennedy*, 81 Iowa, 360, [25 Am. St. Rep. 503, 46 N. W. 1088].) There one of the representations by which the complaining subscriber had been induced to take the stock was that one L. H. Mallory, a resident for many years of the community and known as a man of large business experience and capacity, and a successful business man, had subscribed for five thousand shares in the company, whereas in truth he was given the stock for the influence of his name in procuring subscriptions. In speaking of this feature of the case the court said: "The fact that Mr. Mallory was not to pay for his stock was concealed from the appellee. To have disclosed it would have been to defeat the very purpose for which the five thousand shares were given to Mr. Mallory. We have no doubt but the belief that Mr. Mallory had subscribed for five thousand shares of the stock, and that he had or was to pay for the same, operated as an inducement to appellee to subscribe for the stock and execute the contract in question. This was such a fraud as cannot have the approval of a court of equity, and for which the contract induced by it should be canceled and held for naught."

In the case at bar it plainly appears that the sole inducing cause of the subscription was the false statements as to the

connection of Mr. Carlson with the corporation plaintiff—a man in whose integrity and business capacity the respondent placed special reliance. We think it clear that such a subscription could be rescinded without the subscriber averring or proving pecuniary damage.

(2) The second contention of the appellant, that the respondent failed to rescind promptly, is also, we think, untenable. The evidence shows that immediately upon discovering the falsity of the representations, and within eight days of the making of the contract of subscription, the respondent wrote to the president of the company repudiating the contract.

(3) Nor do we think that the appellant's third contention can be upheld. The letter of rescission unequivocally stated that the reason for this action on the part of the respondent was that the subscription had been obtained by misrepresentation and fraud on the part of the company's agent. It is true that the specific misrepresentations complained of were not enumerated, and that no reply was vouchsafed by the wife of the respondent to a letter written to her by the attorney of the appellant inquiring of what they consisted. But the most detailed enumeration of those representations would not have made the attempted rescission more unequivocal, although undoubtedly the possession of them would have enabled the plaintiff to form an opinion as to whether the respondent's withdrawal from his contract was justified. The appellant, however, had other means of finding out what these representations were inasmuch as they were made by its own agent, and we cannot assume that the agent would not have disclosed them to his principal upon the latter's demand. In the case of *Savage v. Bartlett*, 78 Md. 561, [28 Atl. 414], speaking of the rights of a stockholder with regard to a corporation to the stock of which he has subscribed, induced by false representations, the court says: "A notice to the company that he rescinds the subscription, giving the reasons therefor, is sufficient."

(4) Nor can we give our adherence to the appellant's fourth contention. The respondent having received nothing from the appellant, could return nothing. The appellant had merely undertaken to issue a certain number of shares of stock upon payment of the balance of the purchase price. While this was a contingent obligation on the part of the corporation, it was *ipso facto* canceled upon the rescission by the

stockholder of his subscription, and the corporation was thereby placed in the same position as if stock issued by it had been returned by the subscriber. The argument that a certain number of shares had been "set aside" for the subscriber, and that the latter therefore had received something which he failed to return, has not even the merit of plausibility.

But one other point made by the appellant requires mention. The respondent's wife was a witness at the trial on his behalf, and, over the objection of the appellant, was permitted to answer affirmatively the following question: "Did you rely on a statement of Mr. Harper that he had a letter from Mr. Carlson and that Mr. Carlson was to be president of the Vulcan Fire Insurance Company prior to your subscribing for this certificate of stock?" The objection was that the question was incompetent, irrelevant, and immaterial, and assumed facts not in evidence. While the subscription sought to be canceled was one made by the husband, and therefore ordinarily it would be immaterial what effect the representations made in obtaining it had upon the wife, it sufficiently appeared that the wife was present at the interview between the agent and her husband and took an active part therein. The company's reply to the letter of cancellation was addressed to her, and was couched in such terms as if she were the active head of the marital community whose funds had been invested in the stock; and it was quite apparent from the evidence of the whole transaction that when the company's agent in his efforts to sell the stock to the respondent had won the lady over, he had gained three-fourths of the battle. But quite apart from this the evidence of the husband that he was induced by the agent's untrue representations to enter into the subscription contract was uncontradicted, so that even if the court ought not to have permitted this question to be answered, its action in so doing cannot be held to have caused any prejudice to the appellant.

For the reasons given the judgment and order are affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 27, 1917.

[Civ. No. 1656. Third Appellate District.—May 30, 1917.]

THE PEOPLE ex rel. HUGH B. BRADFORD, etc.,
Respondent, *v.* ANDRE BARBIERE et al., Appellants.

REDLIGHT ABATEMENT LAW — FORFEITURES AND PROCEDURE — ACT CONSTITUTIONAL.—The “Redlight Abatement Law” of 1913 (Stats. 1913, pp. 20-22), which in its general object is no different from that of sections 315 and 316 of the Penal Code, and which differs in a general sense from those sections only in that its design was to establish a summary method, through the civil processes of the law, for putting a stop to the maintenance of houses of ill fame and other places where acts of lewdness and prostitution are habitually practiced and carried on as a business, is a valid exercise of the police power, and the provisions contained in such act as to forfeitures and procedure do not violate any of the constitutional guaranties of property owners.

Id.—NATURE OF ACTION UNDER STATUTE — USE OF BUILDING FOR IMMORAL PURPOSES — LACK OF KNOWLEDGE OF PROPERTY OWNER.—The action authorized by the statute is *in rem*, or against the property used in the maintenance of the nuisance, as well as *in personam*, or against the person maintaining it, and while, therefore, the owner, having no actual knowledge of the business carried on in his building, might not personally be bound for the costs, the building and furniture may nevertheless be proceeded against and subjected to the forfeitures prescribed by the statute.

Id.—DISOBEDIENCE OF ORDER OF ABATEMENT — CONTEMPT — PUNISHMENT.—The provision of the statute authorizing the punishment as for contempt of any person guilty of disobedience to the order of abatement or the permanent injunction is not void, because, in point of severity, it conflicts with section 1218 of the Code of Civil Procedure, which fixes a penalty for contempts generally.

APPEAL from a judgment of the Superior Court of Sacramento County. Charles O. Busick, Judge.

The facts are stated in the opinion of the court.

R. P. Talbot, for Appellants.

Hugh B. Bradford, District Attorney, and J. R. Hughes, Assistant District Attorney, for Respondent.

HART, J.—This action was instituted against the respondents under what is commonly known as the “Redlight Abate-

ment Law," passed by the legislature of 1913, and entitled, "An act declaring all buildings and places nuisances wherein or upon which acts of lewdness, assignation or prostitution are held or occur or which are used for such purposes, and providing for the abatement and prevention of such nuisances by injunction and otherwise." (Stats. 1913, pp. 20-22.)

It is alleged in the petition that the respondents, Andre Barbiere and Ernestine Moreau, are the owners, respectively, and in severalty, of two pieces of real property, upon which there stand two separate buildings, the one adjoining the other, situated in the block bounded by L and M and Second and Third Streets, in the city of Sacramento. It is charged that the respondent, Moreau, had, previously to the institution of this proceeding, leased to one of the fictitiously named respondents, whose true name the evidence at the trial disclosed to be Pugne Maddalena, for the term of one year, commencing January 1, 1915, the building owned by her and above referred to, together with the furniture therein contained, it being expressly provided in the lease that said building and furniture were to be used by the lessee as a lodging-house; that, at the time this action was brought, on August 12, 1915, and for some time prior thereto, said premises (referring to both pieces described in the petition) "were and now are used for the purpose of lewdness, assignation, and prostitution, and said property and said buildings were and now are a nuisance under the laws of the state of California; that there is on said property a common passageway from one property to the other and from one building to the other erected upon said property and used by the occupants of each building."

The petition alleges that the respondent, Angelo Flores, "is the owner of the furniture, fixtures, and other movable property situated in said building described herein and owned by the said respondent, Andre Barbiere," and that certain fictitiously named persons are the owners of the furniture, fixtures, and other movable property situated in the building alleged to be owned by the said Moreau, "and that said furniture, fixtures, etc., are used in conducting, maintaining, aiding, and abetting said nuisance," etc.

The respondents, Barbiere and Moreau, by their joint answer, admitted their ownership, respectively, of the two pieces of property described in the complaint, but denied that said properties, either singly or together, were used for purposes

of lewdness or prostitution. Moreau admits the lease of her premises to the said Maddalena as alleged in the complaint, but denies that said Maddalena at any time used the premises or any part thereof or the furniture therein contained for the purposes of prostitution assignation, or lewdness of any kind or character.

The respondent, Pugne Maddalena, answering the complaint for herself, admits the making of the lease mentioned above, and that, as lessee under said instrument, she occupied the premises and building belonging to the said Moreau, but denies that she at any time used said premises or building, or any part thereof, for the purpose of carrying on or conducting the business of prostitution or that any acts of lewdness of any character were practiced therein. She admits that there exists a passageway between the property occupied by her and the property of Barbiere, by means of which persons may pass from one of the said buildings to the other, but denies that said passageway is or ever was used "by the occupants of said building or at all."

The court's findings and conclusions of law were in accord with the charges set forth in the complaint, and judgment was thereupon entered as follows: That the two several premises described in the complaint had been and, at the time of the issuance of the injunction *pendente lite*, were being used for the purposes of prostitution and assignation; that said premises as so maintained and conducted constitute a public nuisance; that the temporary injunction be made permanent, perpetually abating said nuisance; that the premises or the buildings be closed for the period of one year, unless otherwise ordered by the court, and that the furniture, fixtures, etc., which it was found were used in the building of Moreau for the purpose of carrying on the business of prostitution, etc., be sold, in accordance with the terms of the statute under which this proceeding was instituted and is prosecuted.

Subsequently to the entry of the judgment, the court, upon the application of the said Barbiere and Moreau, and the filing by them of a bond, conditioned as prescribed by section 9 of the statute, ordered that the premises alleged in the complaint to be owned by Barbiere in severalty be delivered to said Barbiere and Moreau, and that "the aforesaid order of abatement be canceled, so far as the same may relate to the said property."

This appeal is prosecuted from the judgment by the respondents, Barbiere, Moreau, and Maddalena.

The points first presented and discussed by the appellants are in disparagement of the constitutional integrity of the act under which this proceeding was inaugurated and prosecuted. It is claimed that the act contravenes the mandates of the fourteenth amendment to the federal constitution, in that the effect of the authority or power vested in the court by the act to order a building, found to be used for the inhibited purposes, to be closed and not to be used for the period of one year, is, when exercised, to deprive the owner of such property thereof without due process of law. In connection with the point thus stated, appellants assail the act upon other constitutional grounds, claiming that the penalties or consequences authorized by its provisions to be visited upon those setting its mandates at defiance are unreasonably harsh and severe. It is further contended that the provision of the act authorizing the punishment as for contempt of any person guilty of disobedience to the order of abatement or the permanent injunction is, for reasons to be hereafter briefly noticed, void and not enforceable.

Other specific points made will be stated as we take them up for consideration.

The first section of the act in question defines or describes the persons and buildings coming within the purview of its provisions and inhibitions.

The second section provides: "Every building or place used for the purpose of lewdness, assignation or prostitution and every building or place wherein or upon which acts of lewdness, assignation, or prostitution are held or occur, is a nuisance which shall be enjoined, abated and prevented as hereinafter provided, whether the same be a public or a private nuisance."

The third section provides that whenever there is reason to believe that such nuisance is maintained or exists in any county or city and county, the district attorney of such county must, in the name of the people, or any citizen of the state residing in such county may in his own name, maintain an action in equity to abate and perpetually enjoin the person maintaining such nuisance, and the owner or lessee or agent of the place or building where such nuisance exists from main-

taining and permitting the nuisance to be maintained or continued.

Section 4 provides that, when the existence of such nuisance is shown by a verified complaint or an affidavit, the court or judge may issue a temporary injunction for its abatement.

Section 6 reads: "Any violation or disobedience of either any injunction or order expressly provided for by this act shall be punished as a contempt of court by a fine of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment."

The seventh section provides that, when the existence of the nuisance has been established in the action, "an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding or abetting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released, as hereinafter provided. While such order remains in effect as to closing, such building or place shall be and remain in the custody of the court."

The eighth section provides for the disposition of the proceeds of the sale of the chattels, the same to be used in the payment of the fees and costs accruing by reason of the action and the sale, and the balance, if there be any after the fees and costs are paid, to be turned over to the owner of the property sold.

The ninth section provides that if the owner of the building or premises has not been guilty of any contempt of court in the proceedings, and appears and pays all costs, fees, and allowances which are a lien on the building or place, and files a bond in full value of the property, to be ascertained by the court, with satisfactory sureties, "conditioned that he will immediately abate any such nuisance that may exist at such building or place and prevent the same from being established or kept thereat within a period of one year thereafter, the court, or judge thereof, may, if satisfied with his good faith, order the premises, closed under the order of abatement, to be

delivered to said owner, and said order of abatement canceled so far as the same may relate to said property. . . . ”

The legislation with which we are here concerned involves an attempt at the treatment of a sociological problem whose solution has puzzled the best thought of mankind from the beginning of organized society, if not from the beginning of the world. Whether by human legislation the permanent or even partial correction of the evil sought to be stamped out by the law may be accomplished is not a question of pertinent discussion here. All that is required of us in the consideration of this appeal is to ascertain and determine, in the first place, whether the act in question constitutes a valid exercise of legislative power, and if so, whether, in the second place, the specific methods employed for the concrete application of such power are valid or otherwise.

The general object of the legislation involved in the said act is, it is obvious, no different from that of certain penal statutes which have been upon the pages of our law books for many years. Sections 315 and 316 of the Penal Code declare is to be a misdemeanor for any person to keep or reside in a house of ill fame in this state, resorted to for purposes of prostitution or lewdness, or to keep a disorderly house, or any house for the purpose of assignation or prostitution. And the last-named section further places a ban upon the act of letting or leasing property to another, where the owner of the property knows that the same is to be used for the purpose of assignation or prostitution, and makes such act a misdemeanor.

The abatement act is only in furtherance of the policy of the state as established by the sections of the Penal Code above adverted to, and differs in a general sense from those sections only in that, unlike those sections, its design was to establish a summary method, through the civil processes of the law, for putting a stop to the maintenance of houses of ill fame, as that designation is commonly understood, and other like places, where acts of lewdness and prostitution are habitually practiced and carried on as a business. The act, in other words, represents only the concrete application of the state's power of police, and, preferably to the courts of criminal jurisdiction, invokes the aid of the civil courts as the most certain instrumentality for the suppression of an evil which has been by the legislature deemed of so pernicious a nature, in its

effect upon society, as to have actuated that body in denouncing its practice as a public crime. That it is within the competence of legislative authority to invest the civil courts with such power or jurisdiction, is an unquestioned and unquestionable proposition, and, in assigning to the equity side of our courts the exercise of that power, the legislature acted with manifest wisdom, since, by reason of their peculiar constitution and the nature of their remedial power, the equity courts may, with an alacrity equal to the efficacy of the operation of their judicial pronouncements, afford the relief to which the public are entitled under the act under whose provisions this proceeding was initiated and its object consummated in the court below. But the power in a court of equity to abate nuisances, whether public or private, has always been among the most conspicuous of the legal attributes of that tribunal, and the power specially conferred upon it by the act in question is new or novel to that forum in this state only in the nature of the particular subject to which it is thus authorized to be applied. The remedy provided is as ancient as chancery itself, and the fact that the particular nuisance against the maintenance or existence of which the act authorizes equity to apply the force of its remedial power is itself a crime and a law remedy thus provided for its extinction is no argument against the legality or even propriety of placing it within the cognizance of that jurisdiction. Quite to the contrary, the fact that the act of maintaining the nuisance is itself a crime, which would, if it were not in and of itself already one, class it as a nuisance *per se*, furnishes the most forcible reason for authorizing the interposition of equity, to the end that its suppression may speedily and *effectually* be accomplished—a result which experience has demonstrated may not be expected from the courts of criminal jurisdiction, whose proceedings, more from the system itself than from the course of the ministers of the law in conducting those tribunals, are too often characterized by delays and mistrials, and whose judgments involve only the imposition of mere penalties without, as is more frequently true than not, having the effect of permanently abating the nuisance itself.

The only question, then, that can arise with respect to such legislation as is involved in the act in question is whether the consequences of the power conferred, when exercised and applied, are violative of the constitutional guaranties of the

owners of the property affected by a decree granted under the act. We cannot say that such is the case. Indeed, similar and even identical legislation has been in other jurisdictions painstakingly examined and upheld as against the very constitutional objections urged against the statute in the case at bar.

So far as we are aware, Iowa was the first state to adopt a statute such as the one before us. There has been cited here no decision of the supreme court of that state in which the act has been considered. But Iowa has liquor and cigarette laws, whose general purpose is precisely and whose provisions as to forfeiture, etc., are substantially the same as are those of the statute under consideration, and they have been sustained as a valid exercise of the police power. (See *Judge v. Kribs*, 71 Iowa, 183, [32 N. W. 324]; *Tuttle v. Bunting*, 147 Iowa, 153, [125 N. W. 844]; *Hodge v. Muscatine County*, 121 Iowa, 482, [104 Am. St. Rep. 304, 67 L. R. A. 624, 96 N. W. 968]; 196 U. S. 276, [49 L. Ed. 477, 25 Sup. Ct. Rep. 237].)

In the states of Minnesota, Nebraska, and Washington, however, where precisely similar statutes exist, said statutes have been considered by the higher courts of those states under objections urged against their validity for exactly the same reasons that are urged against the validity of the statute before us.

In *State v. Gilbert*, 126 Minn. 95, [147 N. W. 953], the supreme court of Minnesota, reviewing the abatement statute of that state, has this to say, quoting from the syllabi of the opinion: "The act is not invalid, as entailing unconstitutional forfeitures of estate upon conviction for an offense, the legislature having power to provide for specific forfeitures for specific acts, including total destruction, in a proper case, of property *per se* innocent; nor does it authorize summary forfeitures and penalties without sufficient notice and hearing. The act, in its remedial details, as well as in its general purpose, is a proper exercise of the police power, under the test that a police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion."

In *State v. Jerome*, 80 Wash. 261, [141 Pac. 753], the supreme court of Washington holds that the abatement law of that state is a valid exercise of the police power, and that the provisions therein contained, which are similar to those

in our law, as to forfeitures and procedure in no way contravene the constitutional rights or guaranties of owners of the property upon which the decree authorized by the act is intended to operate.

In *State v. Fanning*, 96 Neb. 123, [147 N. W. 215], the supreme court of Nebraska, having under consideration the abatement law of that state, said, among other things: "It is urged that the law is unconstitutional and void for a number of reasons assigned, among others, that it deprives a citizen of his property without trial by jury, and without due process of law, and is a denial of the equal protection of the law. The powers of a court of equity to abate nuisances and to deprive persons of property used in the perpetration thereof have existed for centuries, and have been exercised in this state since its organization. Before the enactment of the statute under which these proceedings are brought, this power was exerted in the case of *Siefert v. Dillon*, 83 Neb. 322, [131 Am. St. Rep. 642, 17 Ann. Cas. 1126, 19 L. R. A. (N. S.) 1018, 119 N. W. 686], to close up a bawdy-house as a nuisance, and to prevent its use for such purpose in the future. The provisions of the Bill of Rights with respect to trial by jury have no application to remedies in courts of equity existing at the time of its adoption (*Littleton v. Fritz*, 65 Iowa, 488, [54 Am. Rep. 19, 22 N. W. 641]), and in such cases due process of law is observed by using the equitable remedies existing concurrent with the strictly legal one of trial by jury, or those provided by statute law which afford notice and an opportunity to defend."

We are satisfied with the conclusion declared in the above cases and the reasons upon which it is predicated, and both the conclusion and the reasons therefor have cogent and, indeed, direct application to the case here.

But it is contended that neither the owner of a building which has been declared a nuisance under the statute nor the building itself can be bound by the adjudication unless such owner has knowledge that such building has been and is being used for purposes interdicted by the statute, and that it is not shown here that the owners of the buildings had knowledge of the character of the illicit uses to which they were being put. The action authorized by the statute is *in rem*, or against the property used in the maintenance of the nuisance, as well as *in personam*, or against the person maintaining it,

and while, therefore, the owner, having no actual knowledge of the character of the business carried on in his building, might not personally be bound for the costs, the building and furniture may nevertheless be proceeded against and subjected to the forfeitures prescribed by the statute. If, therefore, a building or other property is so used as to make it a nuisance under the statute, the nuisance may be abated and the property, if personal, confiscated, and if real, subjected to the consequences of reasonable forfeitures, notwithstanding that the owner had no knowledge that it was used for the unlawful purpose constituting the nuisance. (*Commonwealth v. Howe*, 13 Gray (Mass.), 26; *Hodge v. Muscatine County*, 121 Iowa, 482, [104 Am. St. Rep. 304, 67 L. R. A. 624, 96 N. W. 968]; *State v. Gilbert*, 126 Minn. 95, [147 N. W. 953]; *State v. Fanning*, 96 Neb. 123, [147 N. W. 215]; *Tenement House Department v. McDevitt*, 215 N. Y. 150, [Ann. Cas. 1917A, 455, 109 N. E. 88].) But it has been held that "the owner of property is presumed to know the business conducted thereon." (*Hodge v. Muscatine County*, 121 Iowa, 482, [104 Am. St. Rep. 304, 67 L. R. A. 624, 96 N. W. 968]; 196 U. S. 276, [49 L. Ed. 477, 25 Sup. Ct. Rep. 237]; *State v. Gilbert*, 126 Minn. 95, [147 N. W. 953].)

In the instant case, however, we are justified in saying that a fair and reasonable inference arises from the evidence that both Barbiere and Moreau knew at all times of the immoral uses to which the condemned buildings were being put.

It is further contended that, because in point of severity there is a conflict between the provisions of the abatement law prescribing a penalty as for contempt for the violation of any injunction or order authorized thereunder and section 1218 of the Code of Civil Procedure, fixing a penalty for contempts generally, the former provision is invalid, and it is argued that said provision is so connected with the entire act as that the necessary effect of its invalidity is to render the act as a whole void and nugatory. The contention is obviously untenable and the argument likewise fallacious. Assuming for the purposes of the argument that the section is void for the reason advanced, it is as clear as any proposition may be made that the provision (section 6) of the abatement law relative to contempts is entirely independent of and severable from the other parts of the statute, which are clearly valid, and that the valid parts are capable of enforcement so as to effectu-

ate the paramount object of the statute with the section thereof relating to contempts of the court's adjudications or orders entirely eliminated therefrom. In other words, section 6 and the other parts of the statute are not interdependent, or the latter dependent for its validity upon the former, section 6 merely furnishing a remedy for the more effectual enforcement of all the terms of the court's decree under the law—a remedy which, were it not specially provided by the statute itself, would be supplied by the very section of the Code of Civil Procedure, with whose provisions it is here claimed section 6 of the abatement law conflicts. But we do not acquiesce in the view that section 6 of the abatement law either affects or is affected by the code section referred to. We know of no constitutional limitation upon the right of the legislature to fix reasonable penalties for contempts of the judgments, decrees, orders, or processes of courts of justice, and, in admeasuring such punishments, to assign, as it may do and has done in cases of public crime, to certain acts of contempt a greater or less penalty than is annexed to others, according to the nature of the contempt with respect to the subject matter of the adjudication violated and the consequences of such violation to the public or to individual rights. If, however, the effect of the conflict is to destroy the force or validity of the one or the other of the two provisions, it is the section of the code and not that of the abatement law which is thus affected, since the latter is the later legislative expression upon the subject.

The last point to which attention will be given is that the evidence fails to support the conclusion of the trial court, as embodied in its findings of fact, that the building owned by Barbiere was used in connection with the building of Moreau for the immoral purposes described in the complaint. It is not considered necessary to present herein a detailed statement of the testimony upon this point, or any extended synopsis thereof, to show, as a careful examination of the testimony has convinced us is true, that this point is not well founded. It is sufficient to say that it was clearly made to appear that there was a common passageway maintained from the Barbiere building to the Moreau building, through and by means of which entrance to both buildings was habitually effected by those entering therein, and that said passageway was through the saloon in the Barbiere building, thence to the

apartments maintained by the Maddalena woman in the Moreau building. The fact is, as the evidence shows, that the respondent who is designated in the complaint as "Ernestine Moreau" is the wife of the respondent, Barbier, and, as seen, the testimony appears to show that the two buildings, the one owned by Barbier and the other by his wife, are so connected together and attached to each other that the two may be used as one building; that Barbier, as seen, conducted a saloon in his building, while the other building, as conducted by Maddalena, was used for the purpose of prostitution and assignation; that visitors to the Maddalena apartments entered said apartments through the entrance passing through the saloon. Moreover, from the whole record and the general situation as presented, it is fairly inferable that the entrance into the Maddalena apartments through the saloon was maintained not alone for the purpose of providing for the visitors and inmates easy and unobserved access to the Maddalena apartments, which the evidence plainly enough shows were conducted as a place of prostitution, but also for the purpose of readily furnishing the inmates of and frequenters to the apartments with liquors and wines, and of facilitating the sale of those articles by Barbier to those persons.

There is, in brief, testimony of numerous circumstances tending to establish the proposition that the saloon business of Barbier and the assignation apartments of Maddalena were used to facilitate the business of each; but we need not take the time and space to recite them herein. We are satisfied that both buildings were used for the illicit purposes denounced by the statute.

The record has discovered to us no reason for molesting the judgment, and it is accordingly affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1659. Third Appellate District.—May 30, 1917.]

F. P. MARSHALL, Respondent, v. **RANSOME CONCRETE COMPANY**, Defendant; **SOUTHWESTERN SURETY INSURANCE CO. (a Corporation)**, Appellant.

WORKMEN'S COMPENSATION ACT — REDUCTION OF LIABILITY — SURGICAL OPERATION — INABILITY TO PROCURE.—An insurance carrier is not entitled to have an award of compensation made by the Industrial Accident Commission reduced or discontinued on the ground that the injured person refused or declined to undergo a surgical operation which would relieve the disability, in the absence of any showing that he had the means to alleviate his situation, or that the refusal was the result of his own negligence, and where it is shown that he had on two different occasions submitted to an operation with but little, if any, benefit.

ID.—INJURIES FROM NEGLIGENCE — MITIGATION — CARE REQUIRED.—One who has suffered personal injuries through the negligence or wrongful acts of another is bound to exercise reasonable care and diligence to avoid loss and to minimize the consequences of the injury, and he cannot recover for so much of his damage as results from his failure so to do, but he is not required to take the best care of his injuries, nor to employ the means best adapted to heal them, it being sufficient if he acts in good faith and with due diligence, and exercises ordinary care and reasonable or ordinary prudence.

APPEAL from a judgment of the Superior Court of Sacramento County. Peter J. Shields, Judge.

The facts are stated in the opinion of the court.

George F. Hatton, Gus L. Baraty, and Hartley F. Peart, for Appellant.

Landreth & Patten, for Respondent.

Christopher M. Bradley, for Industrial Accident Commission.

BURNETT, J.—On the seventh day of March, 1913, at Sacramento, the applicant, F. P. Marshall, was seriously injured by the falling of a concrete tower. He was an employee of the Ransome Concrete Company, and there is no dispute that he became subject to the provisions of the Workmen's

Compensation Act. Appellant was the insurance carrier, and it paid him sixty-five per cent of his average weekly wages from the eighth day after the injury up to the eleventh day of September, 1914, when appellant concluded that the disability was not more than fifty per cent of total, and it paid compensation at the rate of \$9.37 per week up to and including the ninth day of January, 1915, when further payments were discontinued. On February 2, 1915, Marshall filed with the Industrial Accident Commission his application for adjustment of his claim for further compensation. The claim was resisted on the grounds: 1. That the Industrial Accident Commission had no jurisdiction over a controversy arising out of an accident which occurred on March 17, 1913; and, 2. "That it would be possible by an operation to reduce the rate of disability to twenty-five per cent of total and inasmuch as applicant refuses to have such operation performed at his own expense, he is responsible for and willfully contributes to whatever disability now exists in excess of twenty-five per cent of total disability."

These objections were carefully considered by the Industrial Accident Commission, as shown by the evidence taken and by the opinion filed in the cause. As to the question of jurisdiction, attention was called to the provision in the law of 1913 conferring upon the Industrial Accident Commission all the duties, liability, authority, powers, and privileges theretofore conferred upon the industrial accident board, and it may be said that there is no further contention as to this question.

As to the other point the commission declared: "The Roseberry act limits the medical and surgical service to cure and relieve to the sum of one hundred dollars, and for that reason this commission has no power to require medical or surgical treatment in excess of said one hundred dollars; but the act also nowhere confers upon the commission power to compel an injured employee to undergo an operation and to bear the cost and expense of medical or surgical treatment for the same, even for his own cure." The commission furthermore proceeded to consider the extent of the liability of the insurance carrier in the premises, the amount already paid and the balance of the unpaid liability, and it concluded that the only method available for the insurance carrier to reduce its liability was to reduce the disability. The commission, reiter-

ating its position that it is powerless to compel either party to follow the suggestion, earnestly recommended that the insurance carrier proffer the proposed operation to applicant at its own cost and that the applicant accept the offer. Finally it was said: "Before applicant submits to an operation, if tendered, this commission desires to have further surgical advice in relation to the feasibility of such operation." Two days thereafter the commission filed its findings of fact and made its award, directing the defendants, and each of them, to pay to F. P. Marshall, as a partial disability indemnity because of said injury, "the sum of nine dollars and thirty-seven cents per week for each and every week from and beginning with the tenth day of January, 1915, until the termination of said disability or the further order of this commission."

An application to the superior court of Sacramento County to review said award was made by the Insurance Company and therein said award was affirmed, and we have before us an appeal from the judgment of that court.

The particular finding of fact by the commission which has given rise to the discussion is as follows: "That the present disability of the applicant can be greatly relieved by a surgical operation, the risk of which is inconsiderable in view of the seriousness of the disability. That the defendants are entitled, if they shall tender such operation at their own expense and it shall be refused by the applicant or shall be accepted and successfully performed, to have the partial disability indemnity herein provided reduced or terminated as the result of the operation, if performed, may warrant."

It is to be observed that when the opinion was filed the commissioners were in doubt as to the feasibility of such operation, but at the time the findings were filed they were apparently convinced that the service should and could be performed.

As to the first criticism of appellant it is apparent that the commission did not require nor attempt to require medical or surgical service in excess of one hundred dollars. It was only a recommendation that the additional service be proffered. Granting that no authority exists in the law for such recommendation, we find it decided, in *Southwestern Surety Ins. Co. v. Pillsbury*, 172 Cal. 768, [158 Pac. 762], that "An award of compensation, which is otherwise in due form and complete in itself, is not invalidated by the fact that it in-

cludes an optional right to the insurance carrier, which if accepted by it, would compel it to pay for surgical services rendered later than the ninety-day period following the accident." It could not vitiate the award, but may be disregarded, as would be any other gratuitous suggestion or recommendation.

The point, however, to which appellant seems to attach the most serious consideration is that the refusal of an injured employee to undergo an operation to relieve him is ground and reason for terminating his compensation. As to this, though, it must be said we have before us no such case. There is no finding that the employee has refused to undergo an operation. There could be no refusal without an offer or direction or demand, and it is apparent there has been none of these. The finding does indeed suggest and advise that there be such an offer, and it implies that it may be refused. There is also a promise that if such condition should develop, the indemnity may be reduced or terminated. This, however, looks to the future, and cannot be regarded as of any present practical value. There is no finding even that the applicant is unwilling to undergo an operation or that he has declined to submit to one. Nor are we informed that the applicant is in a position to secure the services of a surgeon who can perform the operation. The fact is, and it must be manifest upon a moment's reflection, that said finding is of no material importance in the determination of the cause. It may be entirely disregarded without doing violence to any rule of practice or procedure. The recommendation as to the "tender of the operation" must be eliminated, as we have seen, and we have left nothing but the bald statement that "the present disability of the applicant can be greatly relieved by a surgical operation, the risk of which is inconsiderable in view of the seriousness of the disability." It is not supplemented or qualified by a single fact indicating any remissness on the part of the applicant or, for that matter, of the Surety Company. It points to no concrete fact or circumstance imputing negligence to the applicant or to the Insurance Company. It does not affect in the slightest the present right of the applicant to receive indemnity nor the claim of appellant to have the payment reduced or discontinued. Rejecting this finding, therefore, as a mere generalization, we have left in the other findings ample support for the award.

But suppose we consider the case as though the applicant had refused or declined to submit to the surgical operation, and what would be the consequence? Upon this theory, should the award be annulled? In this consideration is involved, of course, the general rule as to the care required of the injured person to mitigate the trouble and promote recovery. Probably the rule is as well stated as anywhere in 8 R. C. L. 447, as follows: "It has been pointed out that one who has suffered personal injuries through the negligence or wrongful acts of another is bound to exercise reasonable care and diligence to avoid loss or to minimize the consequences of such injury, and that he cannot recover for so much of his damage as results from his failure to do so. Thus he is bound to exercise reasonable diligence in securing medical or surgical aid, take all reasonable care of the injury and to make use of reasonable means to prevent aggravation of it or to effect its speedy and complete cure. He is not required to take the best care of his injuries, however, nor to employ the means best adapted to heal them. It is sufficient that he act in good faith and with due diligence and that he exercise only ordinary care and reasonable or ordinary prudence of judgment."

Necessarily, said rule implies that the sufferer is able to employ the means that are needed to alleviate his situation. It would be a strange law that would require him to act with ordinary care and prudence and yet penalize him because of his inability, through indigence or otherwise, to avail himself of the remedy. An impossible or unavailable remedy is, of course, no remedy at all. If the injured person cannot appropriate the means, the effect as to him is the same as though they did not exist. His inability, unless shown to be the result of his own negligence, must be a complete answer to the charge of culpability. And, in considering the finding, we must assume that the applicant was in no position to avail himself of the operation; in other words, that it was practically impossible for him to adopt the course contended for by appellant. If we look to the evidence, we find that such was actually the situation. He said he had thought of the recommendation of the physicians to get a specially fitted shoe, "but I didn't do it, because it would cost too much, and I haven't had more than a dollar at a time since they cut me down." Furthermore, he declared he had no money "to pay for special plates or hospital fees or an operation." It also

appears that he was in debt to the extent of five hundred dollars for medical treatment which he had already received. It is fair to infer from the testimony of one of the physicians that the suggested operation with the necessary subsequent treatment would cost four or five hundred dollars, and there is nothing in the record to show that the applicant had the means or credit required for the purpose.

The foregoing ought to be sufficient to excuse and justify the applicant for his failure to take any affirmative action in the matter, but another reason also appears in the record that might properly cause a prudent person to hesitate before submitting to the recommended ordeal. It appears that he had submitted to an operation on two different occasions with but little, if any, benefit, and that he had consulted with Drs. Stephenson and Shaw, who told him that his leg "was as good as it ever would be, that it couldn't be improved on," and that nothing else could be done to improve it. He also consulted Dr. Garrett, who said he "didn't see where an operation would benefit, and that there was probably one chance out of a hundred of it doing any good, and that I couldn't have any more motion in the ankle than I had now, and I wouldn't have, no matter how straight the leg was, and it would hinder me walking stairs and that kind of thing, and that he considered me, as far as my trade was concerned, to be totally disabled." Assuredly the foregoing furnished the basis for a rational belief on the part of Marshall that the supposed benefit from an additional operation was problematical, and it justified his disinclination or refusal to take the chances.

Indeed, one of the physicians who testified at the hearing declared: "If that was in my own family, I wouldn't rely on my own judgment; I would take him back to Dr. John B. Murphy, or a man of that character, but I would be very, very doubtful of any good results to be obtained in that limb." It is true that other physicians testified that the operation could be performed with great promise of success and without serious danger, and the commission so found, as we have seen; but, after all, that is simply a matter of opinion, and it cannot be said that the applicant was bound to follow that opinion at his peril.

The applicant himself aptly sums up his reasons for declining the operation in these words: "They said that I had to

pay for the operation, and I didn't think an operation would do me any good; also, that I didn't like to take chances of going under another anesthetic."

We are satisfied that any just view of the case must lead to the conclusion that he should not be penalized for his conduct under the circumstances herein disclosed.

Many cases have been cited by appellant, but they are not particularly in point. They are instructive, however, as illustrations of the application to certain conditions of the general principle to which we have already adverted. To a few of these we may devote brief attention.

The case of *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, [153 Pac. 24], really involves an injury incurred not in the course of the appellant's employment. It seems that the applicant's arm was broken while in such employment, that it was properly treated and was progressing favorably when, during a trip not for or in the service of the employer, the bone shifted or slipped so that it had to be rebroken and reset. It was held that the law did not authorize an award for the additional injury sustained by him, aggravating the first injury and prolonging the disability, for the reason that this additional injury was incurred while he was not in the employ of the company. No such question manifestly arises here.

In *Fidelity & Deposit Co. of Maryland v. Industrial Accident Commission*, 171 Cal. 728, [L. R. A. 1916D, 903, 154 Pac. 835], the applicant was injured while driving his automobile in excess of the speed limit provided by the state Motor Vehicle Act, and it was very properly held that this violation of a state law amounted to willful misconduct which disqualified the employee. There is no contention that in the case at bar Marshall was guilty of any disobedience of orders or violation of law that could be construed as willful misconduct.

Several cases from foreign jurisdictions are cited wherein it was held that the applicant was not entitled to compensation, for the reason that he had refused an operation, but, while it does not explicitly appear that the services were offered at the expense of the employer or insurer, such is a reasonable inference from the language of the opinions therein. It is at least clear that the cases were decided upon the principle that the injured person must "avail himself of such reasonable remedial measures as are

within his power," or, as expressed in one of the cases: "A workman must behave reasonably or his incapacity is the consequence of his own unreasonableness. To hold to the contrary would lead to this result, that a workman who had an injury, however small, might refuse to allow it to be dressed and let a trifling burn, say, become a sloughing sore and lead to partial or total incapacity."

Probably no more satisfactory consideration of this question can be found than in *Lesh v. Illinois Steel Co.*, 163 Wis. 124, [L. R. A. 1916E, 105, 157 N. W. 539], a recent decision of the supreme court of Wisconsin, wherein the leading cases are reviewed. Therein the applicant had injured his leg and after a certain date claimed compensation for permanent disability. The accident commission found that the present disability resulted from the workman's own willful refusal to submit himself to safe medical treatment, and he was denied further compensation. Among the interesting declarations of the court was the following: "No question of compelling the applicant to submit to an operation is involved. The question is: Shall society recompense a workman for a disability caused by his unreasonable refusal to adopt such means to effect a recovery as an ordinarily prudent person would under like circumstances and which would result in the removal of the disability within the rule as stated above? . . . The proposition that an applicant, under the provisions of this humane law, may create, continue, or even increase his disability by his willful, unreasonable, and negligent conduct, claim compensation from his employer for his disability so caused, and thereby cast the burden of his wrongful act upon society in general is not only repugnant to all principles of law, but is abhorrent to that sense of justice common to all mankind." How different such a case is from the one herein is apparent at a glance. The principle therein so strongly stated imperatively demands the acquittance of the applicant herein of any condemnation or censure. It cannot be said that he acted in a "willful, unreasonable, or negligent" manner, and to deprive him of the benefit of this "humane law" would indeed be "repugnant to all principles of law" and "abhorrent to that sense of justice common to all mankind."

We conclude that the judgment of the lower court is manifestly right, and it is therefore affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 2033. First Appellate District.—May 31, 1917.]

**G. ALBERT SMITH, Respondent, v. GEORGE LOBB et al.
Appellants.**

LANDLORD AND TENANT—TERMINATION OF LEASE—SUFFICIENCY OF TENDER.—A lease giving the lessor the right to terminate it on the first day of December of any year during the term by paying to the lessee such amount as might be due him for certain reclaiming and leveeing work which the lease provided he was to do, and for which he was to be paid a stipulated sum per acre, is terminated by leaving a properly indorsed certificate of deposit for the amount in question with a bank of excellent standing convenient to the lessee's place of business, with a written request to notify the lessee that the certificate was there subject to his order, notwithstanding the bank misunderstood the instructions and notified the lessee that the certificate had been left with it to be held pending settlement between the parties in regard to some levee work, where the lessee thereafter learned that the certificate was being held subject to his order, and made no objection at that time, or at any other time, to the time or mode of the tender.

ID.—TENDER OF CHECK—PAYMENT OF MONEY OBLIGATION.—The tender of a check or of a certificate of deposit in payment of a money obligation is good unless objected to.

APPEAL from an order of the Superior Court of Fresno County granting a new trial. George E. Church, Judge.

The facts are stated in the opinion of the court.

H. P. Brown, John G. Covert, and M. K. Harris, for Appellants.

L. L. Cory, Frank Kauke, and C. K. Bonestell, for Respondent.

KERRIGAN, J.—This is an appeal by defendants from an order granting a motion for a new trial in an action for conversion after verdict and judgment for defendants.

The plaintiff and defendant George Lobb had entered into a lease, under which Lobb, the lessor, might on the 1st of December of any year during the life of the lease terminate it by paying to the plaintiff, the lessee, such amount as might be due him for certain reclaiming and leveeing work which

the lease provided he was to do and for which he was to be paid a stipulated sum per acre. The amount that was due the plaintiff on December 1, 1913, under this arrangement is not disputed, but he asserts that the defendant Lobb did not at that time pay him that amount, or make a legal tender thereof, in an effort by said defendant to terminate the lease. If this be true, it follows that the lease was not canceled, and that plaintiff was entitled to a certain proportion of the crop raised on the demised premises in the year 1914, which was withheld by said defendant, and which withholding forms the basis of the conversion alleged in the complaint.

The case was tried before a jury, and judgment went for the defendants, but the trial court granted plaintiff's motion for a new trial on the ground, as was admitted at the oral argument of this appeal, that the trial court was of the opinion that it had fallen into error in admitting certain evidence offered by defendants relating to an alleged tender by defendant Lobb to the plaintiff of the amount of money necessary to terminate said lease.

We are of the opinion that the evidence in question was properly admitted by the court, and that consequently its order granting a new trial upon the ground indicated was erroneous.

The facts regarding the tender are that the defendant, desiring to pay to the plaintiff the amount of money necessary under the provisions of the lease to effect its termination, and having said sum in his possession, attempted on the first day of December, 1913, to find the plaintiff, diligently looking for him at places where he was most likely to be found. Failing to find him, he on the following day left a properly indorsed certificate of deposit for the amount in question with a bank of excellent standing convenient to plaintiff's place of business, and requested the bank in writing to notify the plaintiff that the certificate of deposit was there subject to his order. The bank, however, having misunderstood its instructions, notified the plaintiff that the certificate of deposit had been left with it to be held "pending settlement" between the plaintiff and said defendant "in regard to some levee work." About two weeks later the plaintiff called at the bank to ascertain the particulars of the deposit, and he then learned that the certificate of deposit was properly indorsed and was then subject to his order, and that he could have the certificate it-

self or its equivalent in money. This tender, as we understand the record, was kept good. Neither at that time nor at any time prior to the trial did plaintiff object to the time or to the mode of the tender, and hence, under the settled rule, he must be deemed to have waived any objection that he might have made thereto. It has been held that the tender of a check or of a certificate of deposit in payment of a money obligation is good unless objected to. (*Mitchell v. Vermont Copper M. Co.*, 67 N. Y. 280; *Becker v. Boon*, 61 N. Y. 317. See, also, *Rohrer v. Bila*, 83 Cal. 51, [23 Pac. 274]; *Kofoed v. Gordon*, 122 Cal. 314, 320; *Hidden v. German Savings & Loan Soc.*, 48 Wash. 384, [93 Pac. 668]; Civ. Code, secs. 1489, 1501.)

The tender being made in good faith, and any informalities in the deposit in the bank of the amount due him being waived by plaintiff's failure to object to it as made, the lease was thereby terminated and the obligation of said defendant to plaintiff extinguished. (Civ. Code, secs. 1500, 1504; *Colton v. Oakland Bank of Savings*, 137 Cal. 376, [70 Pac. 225]; *Baker v. San Francisco Gas etc. Co.*, 141 Cal. 710, [75 Pac. 342]; 38 Cyc. 132, 163.)

It thus appearing that the evidence of tender and deposit with the bank was properly admitted, it follows that the court erred in finally holding otherwise and in granting upon that ground the motion for a new trial. The order is reversed.

Richards, J., and Beasly, J., *pro tem.*, concurred.

[Civ. No. 2305. Second Appellate District.—May 31, 1917.]

W. H. BOSS, Petitioner, v. WALTER A. LEWIS, as County Auditor, etc., et al., Respondents.

VITAL STATISTICS ACT—FEES OF LOCAL REGISTRARS—PAYMENT OUT OF COUNTY TREASURY—CONSTITUTIONAL LAW.—The provisions of the Vital Statistics Act which impose upon the county treasury the burden of payment of a local registrar's fees are not violative of article XI, section 13, of the constitution, as an attempt on the part of the legislature to delegate to a private individual the power to appropriate and interfere with county money, nor are they violative of the provisions of article XI, section 12, taken with article XIII, section 14, of the constitution.

APPLICATION for a Writ of Mandate originally made to the District Court of Appeal for the Second Appellate District to compel the issuance and payment of a warrant for fees of a local registrar under the Vital Statistics Act.

The facts are stated in the opinion of the court.

Kemper B. Campbell, for Petitioner.

A. J. Hill, County Counsel, and Roy V. Reppy, Assistant City Counsel, for Respondents.

CONREY, P. J.—The petitioner is the city clerk of the city of Huntington Park, a city of the sixth class. As such city clerk he is local registrar for the primary registration district comprised within the city of Huntington Park, as provided by chapter 378, found at page 575 et seq. of the Statutes of 1915. In this proceeding he seeks to compel the county auditor of the county of Los Angeles to issue his warrant payable out of the county treasury for certain fees to which the petitioner claims to be entitled under the provisions of that act, and to compel the county treasurer to pay the same.

For convenience, we will designate the statute as the Vital Statistics Act.

The state board of health is an official body authorized by article XX, section 14, of the state constitution, and established in accordance with certain provisions of the Political Code. (Pol. Code, secs. 2978-2984.) The code sections authorize the state board of health to appoint a secretary, whose duties are duly defined and who is a civil executive officer. In the Vital Statistics Act it is provided that the secretary of the state board of health is *ex-officio* state registrar of vital statistics, and that he "shall have full supervision and control over the central bureau of vital statistics which is hereby authorized to be established by said state board of health." It is directed that the state board of health shall appoint a competent vital statistician and a clerk, and "shall provide for such clerical and other assistants as may be necessary for the purposes of this act." It is provided that the state registrar shall have charge of the registration of births, marriages, and deaths; and that the state board of health shall be charged with the uniform and thorough enforcement

of the law throughout the state, and shall promulgate any additional rules or regulations.

Certain portions of the Vital Statistics Act read as follows: "Sec. 3. For the purposes of this act the state shall be divided into registration districts as follows: each city and county, city and incorporated town and each county exclusive of the portion included within cities and incorporated towns shall constitute a primary registration district." "Sec. 4. . . . the clerk of each city and incorporated town shall be the local registrar in and for such primary registration district and shall perform all such duties of local registrar as hereinafter provided;" "Sec. 20. Each local registrar shall be paid the sum of twenty-five cents for each birth certificate and each death certificate properly and completely made out and registered with him, and correctly recorded and promptly returned by him to the state registrar, as required by this act. . . . All amounts payable to a local registrar under the provisions of this section shall be paid by the treasurer of the county in which the registration district is located, upon certification by the state registrar. . . . " The duty of county auditors to issue warrants in favor of persons entitled thereto in payment of claims and demands chargeable against the county is defined by section 4091 of the Political Code.

It is conceded that the collection of vital statistics is a state function and that the local registrars are state officers, and that the county charter of Los Angeles County contains no provisions affecting the state's general powers in the particulars at issue in this proceeding. The proper disposition of this case requires nothing more than that we pass upon the specific propositions urged by counsel for respondents, who contend that those provisions of the Vital Statistics Act which impose upon the county treasury the burden of payment of a local registrar's fees are unconstitutional and void. Those propositions are stated as follows: (1) That the provisions in question are violative of article XI, section 13, of the constitution, and are an attempt on the part of the legislature to delegate to a private individual the power to appropriate and interfere with county money. (2) That the legislature has not the right to require a county to meet any portion of the burden of government within its confines with which the county has no connection whatever. (3) That the legisla-

tion in question is forbidden by section 12 of article XI, taken together with section 14 of article XIII of the state constitution.

Article XI, section 13, of the constitution reads as follows: "The legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatever, except that the legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state." We do not find in the sections of the Vital Statistics Act to which reference is made any violation of the foregoing section of the constitution. There is no attempted delegation of power, as that term should be understood. The act itself is complete and prescribes duties which must be performed. No attempt is made to vest in the state board of health or in the state registrar any discretion as to whether or not there shall be local registration districts or local registrars. The state board of health is an official body created to enforce a general and permanent law for the entire state. The state registrar and local registrars are administrative officers under its supervision. None of them come within the description of "special commission, private corporation, company, association, or individual." They are not vested with discretionary powers under which they might control, appropriate, supervise, or in any way interfere with county money. The control and the appropriation are the direct effect of the statute incident to the performance of the duties imposed by the statute. When the state registrar, after receiving his report from the local registrar, makes to the treasurers of the several counties his certificate of the number of births and deaths properly registered, with the names of the local registrars and the amounts due to each of them as fees for the performance of their duties at the rates fixed by the state, he is not exercising a power to appropriate county money, but is merely performing an administrative or clerical act which is necessary to carry into effect the provisions of the statute.

In our opinion, the requirement that the fees of local registrars shall be paid out of the county treasury is not in conflict with any limitation upon the power of the legislature to impose upon counties the burden of expense incurred in the performance of a state governmental function. The particular reason urged by respondents for their contention is that the county has no connection whatever with the performance of those functions. The position of counsel seems to be that, although the object of county government is to carry out state purposes and perform state functions locally, yet that the payment of compensation to public officers for the performance of general public duties imposed upon them by the state and performed by such officers within a county may not be imposed as a burden upon the county treasury unless those officers are in fact county officers acting as part of the local governmental unit. Counsel would distinguish between the rule applicable in the case at bar and the rule covering the compensation of district attorneys, assessors, sheriffs, and other county officers performing state functions locally and whose compensation and expenses it is admitted that a county may be required to pay, even when the expense thus incurred relates solely to the performance of state functions within the county. But we think that the distinction to which counsel refer is one of form and not of substance. A county is a mere political agency of the state, and holds its property on behalf of the state for governmental purposes. (*Reclamation District v. Superior Court*, 171 Cal. 672, at pages 679 and 680, [154 Pac. 845].) It is created by the state, acting independently of the local population; therein it is significantly different from a city. In the case cited many instances are given illustrating legislative control over public property intrusted to the governmental management of counties and other subordinate districts of the state. Since the state has those powers, we perceive no sufficient reason for refusing to hold that under appropriate conditions and in the exercise of its police power, as in the case at bar, the legislature may direct the performance of prescribed state functions through local officers within the several counties of the state, and award to them compensation payable out of the public funds in the county treasury.

Section 12 of article XI of the state constitution reads as follows: "The legislature shall have no power to impose taxes

upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." Section 14 of article XIII of the same constitution provides a method of raising money for state purposes. Certain sources of revenue are separately defined upon which taxes shall be entirely and exclusively for state purposes. The taxes levied upon the corporations and other associations there described and upon their property are to be in lieu of all other taxes and licenses, state, county, and municipal, upon the described property, except in the instances provided in that section. Subdivision (e) of the section states that "out of the revenues from the taxes provided for in this section, together with all other state revenues, there shall be first set apart the moneys to be applied by the state to the support of the public school system and the state university. In the event that the above-named revenues are at any time deemed insufficient to meet the annual expenditures of the state, including the above-named expenditures for educational purposes, there may be levied, in the manner to be provided by law, a tax, for state purposes, on all the property in the state including the classes of property enumerated in this section, sufficient to meet the deficiency."

Quoting to us these provisions of the constitution, respondents argue that their effect is to disable the legislature from meeting any of the annual expenditures of the state from other sources than the taxes provided for upon public service corporations, etc., and a deficiency tax to be levied in case those taxes are insufficient. It is claimed that if the legislature may call upon the counties to assist the state in meeting the expenses of state government out of moneys raised by local taxation, the exercise of that power may result in destroying the integrity of the system of taxation established by the constitution. But we think that the fearful consequence does not follow. Section 14 does declare that the taxes levied upon certain classes of property shall be entirely and exclusively for state purposes. It does not say that the legislature may not for state purposes impose any taxes upon other classes of property than those so enumerated. It is directly contem-

plated that there may be other state revenues than those derived from the taxes provided for in section 14. And it is well known that the state is now deriving revenues from licenses and other taxes not collected from the special sources described in section 14.

Referring again to section 12 of article XI, the contention of respondents is based upon the clause which says that the legislature may by general laws vest in counties, etc., the power to assess and collect taxes for county purposes. We are asked to draw the inference that the legislature is thereby prohibited from vesting in county authorities power to assess or collect taxes for other than county purposes. If such prohibition is to be implied, it comes only by inference and indirection; and being in derogation of the general legislative power of the state, the proposed interpretation will not be favored if the language is capable of any other meaning. The principal purpose of section 12 was to take from the legislature the power to impose taxes upon the several local public corporations for their local purposes. But it was necessary that the power to impose taxes for local purposes should be vested somewhere; therefore, in order to remove all doubt upon the question, it was provided that the authority should be vested in the local corporate authorities. Section 12 contains nothing whatever which purports to establish a rule controlling the power of the legislature concerning the levying and collecting of taxes for state purposes; and we find no reasonable ground for asserting that the subject of taxation for state purposes is included within the scope of that section.

In their discussion of article XI, section 12, respondents refer us to five decisions. These are: *People v. Parks*, 58 Cal. 624; *Quigg v. Evans*, 121 Cal. 546, [53 Pac. 1093]; *Conlin v. Board of Supervisors*, 114 Cal. 404, [33 L. R. A. 752, 46 Pac. 279]; *Graham v. Mayor etc. of Fresno*, 151 Cal. 465, [91 Pac. 147]; *Fleming v. Hance*, 153 Cal. 162, [94 Pac. 620]. In *People v. Parks*, one of the judges (at page 644 of the decision) made the statement quoted by counsel: "A local board cannot be authorized to levy local taxes and assessments for a public purpose. Such a power could not be conferred upon a municipal corporation (Const., art. XI, § 12), neither can it be conferred upon a *quasi*-municipal corporation." In that case, the statement was mere *dictum* and is not authority.

As stated in *Miller v. Dunn*, 72 Cal. 462, 470, [1 Am. St. Rep. 67, 14 Pac. 27], the statute under consideration in *People v. Parks* was declared unconstitutional solely on the ground that the legislature could not delegate to executive officers such legislative powers as it had attempted to confer by that act. In *Quigg v. Evans*, 121 Cal. 546, [53 Pac. 1093], section 12 of article XI of the constitution was held not to apply to the case, since the legislative act there questioned was passed before the adoption of the constitution of 1879 and the particular statute was continued in force. The point there urged by appellants was that the legislature could not compel the city to pay claims for services rendered outside the city limits. At all events, the case would not be applicable here; it dealt with a strictly municipal corporation. In the present case we are discussing the relations between state and county governments under a general statute wherein compensation is provided for an officer performing duties imposed by a general state law, the duties being performed wholly within the county. The cases of *Conlin v. Board of Supervisors*, 114 Cal. 404, [33 L. R. A. 752, 46 Pac. 279], *Graham v. Mayor etc. of Fresno*, 151 Cal. 465, [91 Pac. 147], and *Fleming v. Hance*, 153 Cal. 162, [94 Pac. 620], are likewise distinguishable from the present action, and in none of them was section 12 of article XI mentioned or discussed. We are willing to say here, as was held in the Conlin case, that the legislature has not power to appropriate the funds of a city to the discharge of an obligation against the entire state, or for other than the purposes of such municipality; and although the legislative control over affairs of the county is broader and in some respects more complete than over the affairs of cities, we readily concede that the legislature would not have authority to give money out of the county treasury to a private person who had no other legal claim therefor, as the legislature attempted to do in directing that Conlin be paid his private and invalid claim out of the treasury of the city of San Francisco. But we think that in the exercise of its power of providing for the general welfare of the state, the legislature may by a general law impose duties, all having the same character, upon local officers within the several counties of the state, and provide for them a compensation in proportion to their duties and

payable out of the treasuries of the several counties in which those officers are located.

Let the peremptory writ issue.

James, J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 30, 1917.

[Civ. No. 2347. Second Appellate District.—May 31, 1917.]

GUY L. ASH et al., Petitioners, v. SUPERIOR COURT, etc., et al., Respondents

ELECTION LAW—CANCELLATION OF REGISTRATION OF VOTERS—PARTIES TO ACTION—PROHIBITION.—In an action brought by electors under section 1109 of the Political Code to compel a county clerk to cancel certain registrations of voters, such voters are necessary parties defendant under section 1111 of such code, and the court is without jurisdiction, in an action wherein the county clerk is the sole party defendant, to render a valid judgment of cancellation, and prohibition will lie to restrain the superior court from proceeding with the action until such voters are made defendants and served with lawful process.

APPLICATION for a Writ of Prohibition originally made to the District Court of Appeal for the Second Appellate District to restrain the Superior Court from proceeding with an action to cancel certain registrations of voters.

The facts are stated in the opinion of the court.

Ralph E. Swing, and Frank T. Bates, for Petitioners.

H. T. Dewhirst, *in pro. per.*, and Cecil H. Phillips, for Respondents.

CONREY, P. J.—On the twenty-seventh day of March, 1917, an action was commenced in the superior court of San Bernardino County by Grant Holcomb and others, electors in the city of San Bernardino, against the county clerk of San

Bernardino County, to compel the clerk to cancel certain registrations of voters. The action was instituted in accordance with section 1109 of the Political Code, which reads as follows: "Any person may proceed by action in the superior court to compel the clerk to cancel any registration made illegally, or that ought to be canceled by reason of facts that have occurred subsequent to the time of such registration; but if the person whose name is sought to be canceled be not a party to the action, the court may order him to be made a party defendant." Section 1111 of the same code reads as follows: "In an action under the authority of section eleven hundred and nine the clerk and as many persons as there are causes of action against may be joined as defendants."

The object of the action was to obtain cancellation of registrations of three groups of persons separately listed in Exhibits "A," "B," and "C," of the complaint. It was alleged that each of the persons named in Exhibit "A" does not reside in and has removed from the precinct within which his affidavit of registration stated that he resided at the time of registration. As to each of the persons named in Exhibit "B," it was alleged that the affidavit of registration fails to show whether or not the registering person is able to read the constitution of the United States. As to each of the persons named in Exhibit "C," it is alleged that his affidavit of registration stated a place of residence of the registering person which in fact was conducted as a lodging-house, but did not show what room or floor of such house of residence the registering person occupied; that as to each of the persons named in Exhibit "C" he was not in fact the proprietor or head of or the husband or wife of the proprietor or head of said house. The affidavits of registration referred to of the persons listed in Exhibits "B" and "C" were defective, in that they failed to show facts which are required by the provisions of section 1096, subdivisions 2 and 7, of the Political Code.

Petitioner Guy L. Ash is one of the persons named in Exhibit "A"; petitioner Mrs. Irene Hansen is one of the persons named in Exhibit "B"; and petitioner Frank Pohlmann is one of the persons named in Exhibit "C." They present this petition on behalf of themselves and many other of the persons named in said exhibits. None of said persons are

parties named in the complaint in the action of *Holcomb v. Patty*, and none of them have been ordered to be made parties defendant. The superior court in that action did, on March 27, 1917, make an order that the persons named in said exhibits appear before the court on April 5, 1917, and show cause why their registrations should not be canceled, and that notice of such order be served by mailing a copy of the notice to each of those persons at least five days before April 5, 1917. Aside from this procedure, no service of process has been made upon any person other than the county clerk, who is the sole party defendant. The order to show cause and the mailing of notices in the manner required by said order of court did not constitute any process of law which may be recognized as applicable to the case, and cannot be recognized as having any effect to bring those persons within the jurisdiction of the court.

The clerk has filed his answer in that action and, unless prohibited from so doing, the superior court will proceed to hear and determine the action without making said persons defendants and without service of any lawful process upon them or any of them.

Petitioners claim that the superior court is without jurisdiction to proceed against the clerk alone and order the cancellation of the registrations of the petitioners or any of the persons represented by them in this proceeding. The argument is that each registered voter has a vested right to have his name remain upon the register until it shall be removed by lawful authority; that therefore in any action to cancel the registration of his name he is a necessary party, and judgment adversely affecting his status as a registered voter cannot be rendered unless he has been served with summons or has voluntarily appeared in the action. It is further claimed that as to registered voters belonging to any of the classes comprised within said action, the provisions of section 1111 are mandatory; that the statement in that section that "as many persons as there are causes of action against may be joined as defendants" should be construed as reading to the effect that such persons "must be joined as defendants." In this contention we agree with the petitioners. Primarily the register of elections is a public record created for the purpose of identifying qualified electors, in order to safeguard elections and preserve the purity of the ballot-box. But it

is equally true that a qualified elector who complies with the law has the personal right to have his affidavit of registration received and filed, and that it shall for the lawful period remain a part of the register. After his affidavit has been received and has become a part of the register of elections, he cannot be deprived of this right without some procedure which complies with the requirements of due process of law. In *Pohlmann v. Patty*, *ante*, p. 390, [165 Pac. 447], we said that in determining the sufficiency of the affidavits the acts of the clerk are of a judicial nature, and before accepting them it is his duty to pass upon the certificates and see that they are sufficient in form. "His acceptance of the certificates amounts to a judgment making them a part of the great register. Thereupon the qualified voter becomes entitled to have his name upon the great register, and the clerk is not vested with authority to thereafter remove it therefrom. If subsequently there should occur any facts of the description contained in section 1106 of the Political Code, that section states that the clerk must cancel the registration, or if any facts occur which result in a judgment of cancellation of a registration, it may be eliminated as provided by section 1109 of the Political Code." There may be instances in which the action authorized by section 1109 of the Political Code may be prosecuted and a valid judgment rendered compelling the clerk to cancel registrations without bringing in as party defendant any person other than the clerk. This would seem necessarily to be so in case of the death of the person registered. But whatever may be said of other instances of cancellation of registrations as provided by section 1106 of the Political Code, we think that the power of cancellation of a completed registration without notice to the person whose registration is sought to be canceled cannot be exercised arbitrarily and without notice under any of the circumstances included within the action now pending in the superior court. If the clerk should wrongfully attempt to cancel a registration, there would be a remedy by writ of *mandamus* to compel him to restore the name to the register. But if it be held that a valid judgment may be entered compelling the clerk to cancel a registration in an action wherein the person affected is not made a party defendant, such judgment would effectively stand in the way of any procedure against the clerk to compel recognition of the registered person's rights. He

would have been deprived of a vested right without any opportunity to defend that right, and yet there would be no further legal remedy. To this it is no answer to say that he may then have his name restored to the register by filing a new affidavit of registration; for the wrong may have been done during those days preceding an election when by law the right of registration is suspended.

We may say here, as was said by the supreme court of New York in a similar case, that if the statute may be properly construed to give a judge the right to prevent any person from voting by striking his name from the register—as under the existing law the names of voters must be registered for a specified period of time prior to an election—without adequate procedure to bring such person before the court, “then the provision is of a sweeping and revolutionary character and dangerous in the extreme. . . . Such a power so construed would be unconstitutional as to its exercise, would deny the right of suffrage granted by the constitution of the state, and would leave the election . . . entirely within the power of state judicial officers.” (*In re Ward*, 20 N. Y. Supp. 606.)

It is ordered that the peremptory writ issue prohibiting the respondent court and the judge thereof from canceling or ordering to be canceled any of the affidavits of registration of the petitioners herein or of any other of the persons mentioned in and referred to in their petition, except such of those persons as shall have appeared therein or have been duly made parties defendant and served with lawful process within due time prior to the time of the hearing of said action in the superior court.

James, J., and Shaw, J., concurred.

[Civ. No. 1651. Third Appellate District.—May 31, 1917.]

C. A. BLACK, Respondent, v. GEYSER PEAK WINE AND BRANDY COMPANY (a Corporation), Appellant.

ACTION FOR PRICE OF GRAPE CROP—APPEAL—SUFFICIENCY OF EVIDENCE—AFFIRMANCE OF JUDGMENT.—Upon an appeal from the judgment and order denying a new trial in an action to recover the purchase price of a grape crop, where the record discloses unequivocal, clear, and direct testimony fully supporting and warranting every material finding, the judgment and order must be affirmed.

APPEAL from a judgment of the Superior Court of Sonoma County, and from an order denying a new trial. Emmet Seawell, Judge.

The facts are stated in the opinion of the court.

W. F. Cowan, and J. T. Coffman, for Appellant.

J. R. Leppo, for Respondent.

BURNETT, J.—The action was brought by plaintiff upon his own demand and as the assignee of six assigned claims for the purchase price of grapes of the crop of 1915. Plaintiff alleged that he and his assignors—except one—sold their grapes to defendant upon specific agreements that they were to be paid for at the market price prevailing for said season at the place of delivery when said price became established, and that this market price was in due course established at \$15 per ton for black and \$14 per ton for white grapes. The one exception was in the instance of the assignor, Abshire, wherein an implied contract to the same effect was relied upon. Defendant, in its answer, took issue with this theory of the contracts and alleged that it bought all of said grapes at an agreed price of \$12 per ton for the black grapes and \$10 for the white, and that it had paid the amount agreed upon, which was accepted as full payment by plaintiff and his assignors.

We cannot understand how the learned counsel for appellant could expect this court to interfere with the judgment and order denying the motion for a new trial. The only point made is that the evidence is insufficient to support the findings of the lower court, and to sustain the position of appellant an

interesting and ingenious argument is made. However, respondent in his brief sets out portions of the transcript which disclose unequivocal, clear, and direct testimony fully supporting and warranting every material finding. We have taken pains, by an examination of the record, to verify the quotations of respondent, and we can perceive no good reason for reproducing such testimony or for dwelling upon the well-established rule that must operate here for an affirmance of the action of the lower court.

The judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

MEMORANDUM CASES.

[Civ. No. 2229. Second Appellate District.—March 26, 1917.]

JOHN LAPIQUE, Appellant, v. **CATHERINE AGOURE**, Administratrix of the Estate of Pierre Agoure, Deceased, Respondent.

APPEAL DISMISSED, on the authority of *Lapique v. Plummer, ante*, p. 317.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge.

The facts are similar to those stated in the opinion in *Lapique v. Plummer, ante*, p. 317.

John Lapique, *in pro. per.*, for Appellant.

O'Melveny, Stevens & Millikin, and Stuart O'Melveny, for Respondent.

THE COURT.—It appearing that the facts in this case are identical with those involved in Civil No. 2231, entitled *John Lapique, Appellant, v. Eugene R. Plummer et al., Respondents, ante*, p. 317, wherein an opinion was this day filed dismissing the appeal, it is ordered, upon the authority of the opinion so filed in said last-mentioned case, that the appeal herein be and the same is dismissed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 24, 1917.

[Civ. No. 2230. Second Appellate District.—March 26, 1917.]

JOHN LAPIQUE, Appellant, v. **FRANK E. WALSH**, Administrator of the Estate of Laurent Etchepare, Deceased, Respondent.

APPEAL DISMISSED, on the authority of *Lapique v. Plummer, ante*, p. 317.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge.

The facts are similar to those stated in the opinion in *Lapique v. Plummer, ante*, p. 317.

John Lapique, *in pro. per.*, for Appellant.

H. H. Appel, and Horace Bell, for Respondent.

THE COURT.—It appearing that the facts in this case are identical with those involved in Civil No. 2231, entitled *John Lapique, Appellant, v. Eugene R. Plummer et al., Respondents, ante*, p. 317, wherein an opinion was this day filed dismissing the appeal, it is ordered, upon the authority of the opinion so filed in said last-mentioned case, that the appeal herein be and the same is dismissed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 24, 1917.

[Crim. No. 539. Second Appellate District.—May 28, 1917.]

In the Matter of the Application of DAVID BRODIE for a Writ of Habeas Corpus.

JUVENILE ACT.—The commitment issued under the Juvenile Act is held on its face to warrant the detention of the minor.

APPLICATION for a Writ of Habeas Corpus for the release of a minor committed to the Preston School of Industry.

The facts are stated in the opinion of the court and in the opinion in *Matter of Brodie, ante*, p. 751.

Joseph W. Mowell, for Petitioner.

U. S. Webb, Attorney-General, Robert M. Clarke, Deputy Attorney-General, Thomas Lee Woolwine, District Attorney, and H. S. G. McCartney, Deputy District Attorney, for Respondent.

THE COURT.—The matter of the regularity of the judgment committing the minor above mentioned to the Preston School of Industry was before this court in criminal case No. 513. *ante*, p. 751, an opinion in which has been this day filed reversing the judgment. In this proceeding we think that the commitment issued to the superintendent of the Preston School of Industry on its face is sufficient to warrant the detention of the minor. The prayer of the petition is therefore denied, and it is ordered that the minor, David Brodie, remain in the custody of the superintendent of the Preston School of Industry until required to be returned to the county of Los Angeles for rehearing on the charge upon which he was convicted, or until otherwise discharged by law.

INDEX.

ABATEMENT. See Police Power.

ADVERSE POSSESSION. See Public Lands.

AFFIDAVIT OF MERITS. See Place of Trial, 3.

AGENCY.

1. **WRITTEN AGREEMENT—RECITALS—EFFECT OF.**—A person signing a written agreement which contains upon its face the statement that only the written representations, agreements, and guaranties contained within its terms shall be binding upon the other party to it, cannot rely upon any oral statements made by the agent or representative of such party prior to or at the time of the execution of the written agreement. (*Tockstein v. Pacific Kissel Kar Branch*, 262.)
2. **KNOWLEDGE OF AUTHORITY—EFFECT OF.**—Where a party freely contracts with an agent knowing the limit of the agent's authority, he may not be heard thereafter to assert that he was misled into believing that the agent had greater authority. (*Id.*)
3. **SALE—PAYMENT TO AGENT—ESTOPPEL OF VENDOR.**—A vendor of personal property is estopped from claiming that its local sales agent was without authority to receive payment for goods sold by him, on the ground that his authority was limited to the making of sales, where the vendor was notified by the buyer of the latter's intention to make payment to the agent and no objection was raised thereto. (*Fred Medart Manufacturing Company v. Weary & Alford Company*, 347.)
4. **PRINCIPAL AND AGENT—SALE OF PERSONAL PROPERTY—LACK OF POSSESSION—WANT OF AUTHORITY TO RECEIVE PRICE.**—An agent merely for the sale of personal property, not having possession thereof, is not vested with authority to bind his principal by collection of the purchase price. (*Id.*)
5. **CONTRACT—COMMISSION FOR PURCHASING LAND—FRACTIONAL INTEREST IN PROPERTY—TRUST—SPECIFIC PERFORMANCE.**—An agent who consummated a purchase of a tract of land under an agreement that he should receive as his commission a one-sixth interest in the property, cannot, where the purchaser makes a sale of a portion of the property, which portion was of the value of one-half of the whole tract, have a trust declared in his favor in an undivided one-third interest in the part remaining unsold, or specific performance decreed to that effect, as under such an agreement he is only entitled to a decree for a one-sixth undivided interest of the whole tract. (*Brooke v. Quigley*, 484.)

AGENCY (Continued).

6. **CONTRACT—AGENCY FOR SALE OF MANUFACTURED ARTICLES—INCOMPLETE CONTRACT—PAROL EVIDENCE INADMISSIBLE.**—In an action to recover commissions on the sales within certain territory of various articles manufactured by the defendant, based upon a purported agency contract placed at the bottom of an "order ticket," which, omitting signatures, was in the following language: "To have exclusive agency in Imperial Valley for 1912 and by ordering one car before Feb. 1st, 1913, can have the agency for same season," it is error to admit parol evidence of the missing terms of the agency. (*Edgar Bros. Company v. Schmeiser Manufacturing Company*, 667.)
7. **CONTRACT NOT PERFORMABLE WITHIN YEAR—STATUTE OF FRAUDS.**—Such a contract is within the statute of frauds as one not to be performed within a year, where it was shown by testimony of witnesses that the term "season," as used in the contract, expired in the month of October. (*Id.*)

See *Building and Loan Association; Corporation*, 9-11; *Insurance*, 3-5; *Specific Performance*, 2, 3.

ALIENATION OF AFFECTIONS.

INSUFFICIENCY OF EVIDENCE.—In this action for damages for alienation of affections it is held that the evidence was insufficient to justify the findings and decision of the trial court. (*Van Tassell v. Heidt*, 234.)

AMENDMENT. See *Deposition*, 1, 2.

APPEAL.

1. **FINDINGS—CONFLICT OF EVIDENCE.**—The appellate court will not disturb a finding of fact by the trial court, or the implied finding of a jury that is supported by evidence, if the evidence is conflicting. (*Lincoln v. Pacific Electric Railway Company*, 83.)
2. **MISTAKE AS TO COURT—JURISDICTION—CONSTITUTIONAL LAW.**—The saving clause of section 4 of article VI of the constitution, that no appeal taken either to the supreme court or district courts of appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto, does not give to the court to which the appeal has been wrongly taken any jurisdiction to make orders extending time, or any other orders, except the order of transfer. (*Pierce v. Employers' Indemnity Exchange*, 98.)
3. **DISMISSAL OF APPEAL—FAILURE TO FILE BRIEF IN TIME.**—An appeal must be dismissed where the time for filing appellant's opening brief had expired when the notice of motion to dismiss the appeal was served and filed. (*Id.*)

APPEAL (Continued).

- 4. TYPEWRITTEN TRANSCRIPT—WHEN UNAUTHORIZED.**—There is no authority, either in the rules of court or in the statutory provisions, for a transcript presented by a certified typewritten copy where the appeal is from the judgment upon the judgment-roll alone. Sections 953a, 953b, and 953c of the Code of Civil Procedure, as they were in August, 1914, when the transcript herein was filed, did not apply on such an appeal. (*Lapique v. Plummer*, 317.)
- 5. ALTERNATIVE METHOD — TRANSCRIPT — NONOBSERVANCE OF COURT RULE—DISMISSAL.**—An appeal from a judgment taken under the alternative method must be dismissed, where the reporter's transcript complied only in form and size with rule 7 of the supreme court and the clerk's transcript consisted of what appeared to be some discarded office copies of the pleadings, findings, and judgment, inserted in the reporter's transcript, which contained neither indexing nor paging that was intelligible. (*O'Dea v. Roberts*, 345.)
- 6. FORM AND PREPARATION OF TRANSCRIPT—PURPOSE OF RULE.**—The purpose of rule 7 of the supreme court relating to the form and preparation of transcripts on appeal in civil cases prepared under section 953a of the Code of Civil Procedure is not only to secure records of uniform size for the filing cases in the clerk's office, but the presentation of transcripts in orderly and convenient form, properly paged and indexed, for examination by the court in determining the questions involved in the appeal. (*Id.*)
- 7. DENIAL OF MOTION FOR SUBSTITUTED FINDINGS—NONAPPEALABLE ORDER.**—An appeal from an order denying a motion to substitute other findings of fact for those signed by the court cannot be sustained, as the court has no authority to change its findings of fact after the entry of judgment. (*Bunnell v. Thomas*, 634.)
- 8. CONTRACT FOR LAYING FLOOR IN BUILDING—SUBSTANTIAL COMPLIANCE—AFFIRMANCE OF JUDGMENT.**—Upon an appeal from a judgment and order denying a new trial in an action upon a contract for the laying of a floor of a specified description in a building, where the main question relied upon for a reversal is as to whether or not there was a substantial compliance with the terms of the contract, and the appellant challenges the sufficiency of the evidence to support the finding of the trial court to that effect, the appellate court will not undertake to review or reverse the decision, where it is shown by the record that the judge of the trial court, after hearing the testimony, visited the building and examined the floor itself, and then decided that there had been a substantial compliance with the contract. (*Wright v. Locomobile Company of America*, 694.)
- 9. NOMINAL DAMAGES — FAILURE TO AWARD — INSUFFICIENT GROUND FOR REVERSAL.**—A judgment will not be reversed on appeal for failure to award nominal damages. (*Liljefelt v. Blum*, 721.)

APPEAL (Continued).

10. RECORD—SUFFICIENCY OF AUTHENTICATION.—Upon an appeal from orders made upon proceedings had supplemental to execution, the record is sufficiently authenticated under the provisions of sections 951 and 953 of the Code of Civil Procedure, where the papers and evidence used on the hearing appeared in the form of affidavits and written orders, and were stipulated by counsel to be correct copies. (Pioneer Investment and Trust Co. v. Muncey, 740.)
11. APPEAL FROM JUDGMENT—RECORD—UNAUTHENTICATED AFFIDAVITS.—Upon an appeal taken from a judgment for the purpose of reviewing an order denying a motion to set it aside, on the ground that no notice of the filing of the findings or of the time when the findings would be presented to the judge was served upon the appellant, affidavits in the clerk's transcript, which were filed on the motion to strike out the judgment, cannot be considered, where they were not certified or otherwise authenticated by the judge as having been used at the hearing of the motion. (Boos v. Byrnes, 755.)
12. ORDER DENYING MOTION TO VACATE JUDGMENT—APPEALABLE ORDER.—An order denying a motion to set aside and vacate a judgment is itself an appealable order, and cannot be reviewed upon appeal from the judgment. (Id.)
13. ACTION FOR PRICE OF GRAPE CROP—SUFFICIENCY OF EVIDENCE—AFFIRMANCE OF JUDGMENT.—Upon an appeal from the judgment and order denying a new trial in an action to recover the purchase price of a grape crop, where the record discloses unequivocal, clear, and direct testimony fully supporting and warranting every material finding, the judgment and order must be affirmed. (Black v. Geyser Peak Wine and Brandy Company, 805.)

See Assault and Battery; Contract, 1; Criminal Law, 6, 63; Judgment, 5; Negligence, 2, 4, 5; New Trial, 2; Parent and Child; Summons, 6, 7.

ARSON. See Criminal Law, 13-16.

ASSAULT AND BATTERY.

DEFAULT IN ACTION FOR DAMAGES—JUDGMENT FOR DEFENDANTS—PRESUMPTION UPON APPEAL.—In an action for damages for assault and battery, where the defendants made default, and the trial court, upon application of plaintiff, gave judgment for the defendants, it will be presumed on appeal from the judgment, in the absence of any record of the evidence or findings, that plaintiff, although assaulted, was not damaged. (Liljefelt v. Blum, 721.)

See Criminal Law, 17-20.

ASSIGNMENT.

ASSIGNMENT OF CONTRACT—LIABILITY OF ASSIGNEE.—While the mere assignment of rights under an executory contract does not make the assignee liable to the other contracting party, yet, where after the assignment is made, the executory provisions of the contract are fully performed, the benefit inuring solely to the assignee, and where by his actions he holds himself out as personally liable and recognizes the original contract as binding upon him, he is liable to the other party equally with the assignor. (Robinson v. Rispin, 536.)

See Building Contract, 1, 2; Claim and Delivery, 1; Corporation, 9; Landlord and Tenant, 8, 9; Promissory Note, 2, 4; Sale, 4, 5.

ATTACHMENT.

1. SALE OF POTATOES—SEIZURE BY SHERIFF—OWNERSHIP BY BUYERS—SUFFICIENCY OF EVIDENCE.—In an action brought against a sheriff and the surety on his official bond for the conversion of a carload of potatoes, the ownership of the potatoes by the plaintiffs at the time of their seizure under a writ of attachment by the sheriff in an action against the plaintiffs' vendor, is sufficiently shown by proof of the loading of the same upon the car and the making out of a shipping receipt naming the plaintiffs as consignees, and the receipt of a large payment on account of the price, with assurance of the payment of the balance when the goods were ready to be shipped. (Brinkley-Douglas Fruit Co. v. Silman, 648.)

2. THIRD-PARTY CLAIM—SUFFICIENCY OF DEMAND—WAIVER.—A sheriff is not permitted to question the sufficiency of the demand for the release of attached property made under section 689 of the Code of Civil Procedure, where he acts upon it and demands and receives an indemnifying bond from the claimant. (Id.)

3. WRONGFUL SEIZURE AND SALE OF PROPERTY BY OFFICER—CONVERSION.—Conversion is the proper remedy against a sheriff who seizes and sells property of one person under process against another. (Id.)

4. POSSESSION OF CONVERTED PROPERTY.—In an action of conversion against a sheriff, the plaintiff is entitled to recover where he proves ownership and right of possession together with its appropriation by the defendant, regardless of the fact that at the time of the conversion the property may have been in the possession of a third party. (Id.)

ATTORNEY'S FEES. See Husband and Wife, 2; Injunction, 1.

AUTOMOBILE. See Criminal Law, 21-26.

BANK. See Building and Loan Association; Contract, 10-12; Trust, 3-7, 10-12.

BILL OF LADING. See **Pledge**, 2.

BONDS. See **Drainage District**, 1.

BROKER. See **Vendor and Vendee**, 4.

BUILDING AND LOAN ASSOCIATION.

1. **INDORSEMENT OF CHECK BY SECRETARY—LACK OF AUTHORITY—APPROPRIATION OF PROCEEDS—LIABILITY OF BANK.**—The secretary of a building and loan association has no authority by virtue of his office to indorse and cash a check payable to the association for his own benefit, and where he does so, and is without express authority, the bank cashing the check is liable to the association for the amount thereof. (*Palo Alto Mutual Building and Loan Association v. First National Bank of Palo Alto*, 214.)
2. **USE OF CORPORATE PROPERTY BY OFFICER—NOTICE OF LACK OF AUTHORITY.**—An officer of a corporation has no authority to use the corporate property for his own benefit, and such use is notice of lack of authority. (*Id.*)
3. **PRINCIPAL AND AGENT—KNOWLEDGE OF AGENT—WHEN NOT IMPUTABLE TO PRINCIPAL.**—A principal is not charged with knowledge of his agent where the latter is engaged in a transaction beyond his authority, and in which he is interested adversely to the principal. (*Id.*)
4. **DOCTRINE OF BONA FIDE HOLDER INAPPLICABLE.**—Where the secretary of a building and loan association without authority indorses a check payable to the association to a bank, the doctrine of *bona fide* holder without notice does not apply as between the association and the bank, for they are parties in privity; nor is the bank an indorsee in due course as defined by sections 3123 and 3124 of the Civil Code. (*Id.*)
5. **USE OF PROCEEDS OF CHECK—BENEFIT OF ASSOCIATION—LACK OF ESTOPPEL.**—The fact that the association suffered no loss by reason of the fact that the money obtained from the cashing of the check was used to secure title to property upon which the association held a mortgage does not estop the association from recovering the amount of the check from the bank. (*Id.*)

BUILDING CONTRACT.

1. **ASSIGNMENT—FINAL PAYMENT UNDER BUILDING CONTRACT—RIGHTS OF ASSIGNEE.**—An assignment of the final payment due under the terms of a building contract demands, independently of any statute, an inquiry on the part of the assignee as to the conditions of future payments, and the rights of the assignee are no greater thereunder than those of the contractor itself. (*Suhr v. Metcalfe*, 59.)

BUILDING CONTRACT (Continued).

2. **CONSTRUCTION OF CODE—ASSIGNMENT OF THING IN ACTION—DEFENSES.**—Where the final payment provided by a building contract is not due when an assignment thereof is made, the assignment is of a “thing in action” within the meaning of section 368 of the Code of Civil Procedure, providing that in case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff or other defense existing at the time of or before notice of the assignment. (Id.)
3. **EXTRA WORK—PAYMENT BY NOTE—AGREEMENT TO DELIVER BUILDING CLEAR OF ALL CHARGES—ARCHITECTS’ FEES—PAROL EVIDENCE.** A written agreement whereby a building contractor in consideration of the execution and delivery of the owner’s note acknowledged satisfaction in full for all extras due and agreed to deliver the building upon completion “clear of any charge of any character whatever, also including architect,” is not subject to explanation by parol evidence, and the admission of such evidence for the purpose of showing that the intention was to relieve the owners of any lien for the possible charge of the architects for the extra work put upon the building is erroneous. (Id.)
4. **NOTICE TO WITHHOLD—SUFFICIENCY OF NOTICE—ACCEPTANCE OF ORDER OF CONTRACTOR.**—An order on the owner given by a contractor to a subcontractor and by the latter presented to the owner for acceptance is sufficient notice to the owner to entitle the owner to withhold the amount from the contractor, as provided by section 1184 of the Code of Civil Procedure. (Id.)
5. **DELAY IN COMPLETION—EXTRA WORK—INSUFFICIENT EXCUSE.**—Where a building contract provides that no additional time shall be allowed for completion unless demand therefor be made in writing, delay in performance because of an agreement for extra work is not a sufficient excuse, in the absence of a demand for additional time as provided by the contract. (Id.)
6. **INSTALLATION OF REINFORCING STEEL—REQUIREMENTS OF SUBCONTRACTOR.**—Where a contract for the construction of a garage requires the contractor to construct a concrete building, to be reinforced by steel bars, fabric stirrups, and tying wire, and the specifications provide that bars will be used in all footings, beams, girders, walls, but in no floor or roof slabs, a subcontractor who takes over the contract for the general installation of the reinforcing steel for the building, is required to install reinforced steel bars or fabric in the floor and roof slabs entering into the construction of the building, where his contract requires him “to furnish and set in place in a workmanlike manner all reinforcing steel bars, tying wire, etc., required to be used in the construction of that certain building to be erected on the lands hereinafter described in accordance with the plans and specifications for the construction of said building”; as

BUILDING CONTRACT (Continued).

the expression "etc." means "other reinforcing material," which includes fabric. (*Soule v. Northern Construction Company*, 300.)

7. **INCOMPLETELY INITIALED AND UNATTACHED SPECIFICATIONS — VOID CONTRACT.**—A building contract reciting that the work should be done and performed conformably to the drawings and specifications of certain architects to be filed with the contract and identified by the signatures of the respective parties thereto, is wholly void, where the specifications consisting of three sets were not attached to the contract nor to each other when insufficiently initialed, or subsequently examined or further initialed after they were fastened together and filed for record by some person other than and in the absence of the contractor. (*Blinn Lumber Company v. Cohn*, 386.)

8. **COMPLIANCE WITH SPECIFICATIONS — DEFECTS IN CONSTRUCTION — RECOVERY BY CONTRACTOR.**—Where in the performance of a contract for the doing of certain concrete work in connection with the construction of a building the contractor performed the work in strict compliance with the requisites of the specifications and obtained monthly certificates approving the work, he is entitled to recover the final payment notwithstanding the subsequent cracking of some of the flooring due to an improper mixture of gravel and cement and the refusal of the architect to issue his final certificate because of such defects. (*Roebling Construction Company v. Doe Estate Company*, 397.)

9. **RESULTS OF WORK — WHEN RISK UPON OWNER.**—Where, in the erection of a building, the owner agrees to pay a certain sum for doing a certain part of the work and specifically provides the kind of materials to be used and the manner in which they are to be used, and stands by and directs and afterward approves the work, the risk of its serving the purpose intended by the owner is clearly upon him. (Id.)

See Mechanic's Lien.

CANCELLATION.

1. **CANCELLATION OF MORTGAGE — PURCHASE PRICE OF AGENCY CONTRACT — FAILURE OF CONSIDERATION — RIGHT OF PURCHASER.**—In an action to cancel a conveyance given as a mortgage to secure the payment of the purchase price of a contract giving the right of sale of sub-agencies for the sale of washing-machines, the defendant is not entitled to foreclose the mortgage and leave plaintiff to an action for damages, but the plaintiff, as a defense to the foreclosure, is entitled to show a failure of consideration for which the mortgage was given. (*Shull v. Crawford*, 36.)

2. **TOTAL FAILURE OF CONSIDERATION — NOTICE OF RESCISSION.**—Where there is a total failure of consideration, it is not necessary to give notice of rescission before bringing suit to cancel the contract. (Id.)

CERTIORARI. See *Costa*.

CHECK. See *Building and Loan Association; Criminal Law, 30, 31; Trust, 5-7.*

CLAIM AND DELIVERY.

1. OWNERSHIP AND RIGHT OF POSSESSION—ASSIGNMENT OF CAUSE OF ACTION AFTER SUBMISSION OF CASE—ERRONEOUS JUDGMENT.

Where, in an action against a constable and sureties on his official bond to recover the possession of an automobile taken under a writ of attachment, it is made to appear upon the face of the record that when the complaint was filed, and until the time of trial and submission of the cause for decision, the plaintiff was the owner and entitled to the possession of the property, it is error to find that the plaintiff was not entitled to possession or damages, because of the fact that after such submission there was filed a document purporting to assign to other parties all property and sums of money arising from the cause of action. Under such circumstances, the court should have granted a motion for another and different judgment, and amended its conclusions of law and rendered another judgment accordingly. (*Bunnell v. Thomas*, 634.)

2. DEMAND BEFORE COMMENCEMENT OF ACTION—PLEADING—SUFFICIENCY OF COMPLAINT.

In an action of claim and delivery, the complaint sufficiently shows that demand was made for the possession of the property before the commencement of the action, where it is alleged that the plaintiff on a stated day "demanded" possession and that the defendants "refused and now refuse" delivery, notwithstanding that the day stated was the day on which the complaint was filed. (*Hardison Perforating Company v. Davies*, 738.)

COMMON CARRIER.

CONTRACT FOR SHIPMENT OF GOODS—DELAY CAUSED FROM LACK OF CRATING—DESTRUCTION BY FIRE—LIABILITY FOR LOSS.—Where a van and storage company in the delivery of certain household effects to a railroad company for the purpose of shipment, neglected to crate certain portions of the goods, as required by its contract, in time to get the goods in the freight depot before it closed for the day, and thereupon stored them in one of their warehouses for safekeeping overnight, and the warehouse was destroyed by fire before the next morning and the goods with it, the company is liable for the value of such goods. (*Beall v. Bekins Van and Storage Company*, 652.)

COMMUNITY PROPERTY. See *Husband and Wife, 1-4.*

CONSIDERATION. See *Cancellation; Corporation, 1; Mortgage, 1; Promissory Note, 3, 4; Trust, 8, 9.*

CONSPIRACY. See **Criminal Law**, 13, 51-53.

CONSTITUTIONAL LAW. See **Appeal**, 2; **County**; **Criminal Law**, 25, 26; **Execution**, 2; **Mechanic's Lien**, 10; **Office and Officers**, 1-3; **Place of Trial**, 2; **Police Power**.

CONTEMPT. See **Costs**; **Deposition**, 4; **Police Power**, 8.

CONTRACT.

1. **LEGAL SERVICES—EVIDENCE—SUBSTITUTION OF ORAL AGREEMENT FOR WRITTEN CONTRACT—APPEAL.**—In an action to recover the reasonable value of legal services, oral evidence is admissible to prove that after entering into a written contract providing for the payment of a contingent fee, the parties entered into a new and distinct oral agreement providing that the plaintiff should be paid a fair fee for his services, and where the court who heard such testimony and saw the witnesses believed the same, and found accordingly, the judgment will not be disturbed on appeal. (*Keeley v. Erbe*, 267.)
2. **COMPENSATION FOR USE OF AUTOMOBILE—NEW ARRANGEMENT—INSUFFICIENT PROOF OF TERMINATION OF ORIGINAL CONTRACT.**—In an action to recover compensation for the use of plaintiff's automobile in connection with his work as a salesman for defendant, the original agreement to pay the reasonable value of such use is not shown to have been terminated by the evidence of the plaintiff of a new arrangement subsequently made concerning the use of the machine, in the absence of anything in the record disclosing the terms of such new arrangement. (*Doolittle v. Savage Tire Company*, 476.)
3. **EVIDENCE—BY-LAW OF CORPORATION—MANNER OF FIXING COMPENSATION OF EMPLOYEES.**—In such an action a by-law of the defendant corporation limiting the manner in which the compensation of employees should be fixed, is inadmissible, where it is not shown that plaintiff had notice or knowledge of such by-law at the time the contract was made. (*Id.*)
4. **BREACH OF COVENANT TO GRADE STREETS—INSUFFICIENT COMPLAINT.**—In an action for damages for breach of a covenant of a contract to grade certain streets, in which time was of the essence, but no time for performance fixed, the complaint is fatally defective and the action barred by the statute of limitations, where it appears upon the face of the complaint that the contract was not made within four years prior to the institution of the action, and no averment contained therein that a demand for performance of the covenant was ever made. (*Caner v. Owners Realty Company*, 479.)
5. **DEMAND OF PERFORMANCE—WHEN NECESSARY.**—Where no time is specified for the doing of an act other than the payment of money, a demand for performance is necessary to put the promisor in default. (*Id.*)

CONTRACT (Continued).

6. **TIME FOR DEMAND FOR PERFORMANCE.**—Where a demand for performance is essential to the creation of a cause of action it must be made within a reasonable time, which is the period of time prescribed by the statute of limitations for the outlawry of the action. (Id.)
7. **INDEFINITE TIME OF PERFORMANCE—STATUTE OF LIMITATIONS.**—Where in a contract the time within which an act is to be performed is either indefinite or not specified, the statute of limitations commences to run against an action for failure to perform such an obligation at the expiration of a reasonable time. (Id.)
8. **CONTRACT FOR CONSTRUCTION OF LAUNCH—DEFAULT IN COMPLETION—DIRECTION TO PROCEED WITH WORK—COMPENSATION FOR DAMAGES—LACK OF WAIVER.**—The right to rescind a contract for the construction of a launch calling for its completion within a stated time is waived by the act of the party ordering the launch in urging the contractor to rush the completion after knowledge that it would not be completed within the contract time, but the right to insist upon compensation for the damage caused by the delay is not waived. (Stephens v. Weyl-Zuckerman & Co., 566.)
9. **ACCEPTANCE OF SUBJECT MATTER OF CONTRACT—NONWAIVER OF DAMAGES FOR INCOMPLETE PERFORMANCE.**—The party not in default under a contract is often constrained by his necessities to take what he can get under his contract when he can get it. Such conduct does not and should not operate as a waiver of the right of action for damages. (Id.)
10. **"I. O. U." OF BANK CASHIER—EVIDENCE—OBLIGATION OF BANK—PAROL PROOF INADMISSIBLE.**—An agreement for the payment of a commission on a sale of real property in the form of an "I. O. U.," signed "R. McD., Cashier," does not, when examined alone and for what it shows upon its face, evidence the contract of the bank of which the signer was cashier; and, in an action brought to enforce payment of the agreement, it is error to admit parol evidence to show that the contract was that of the bank and not that of the cashier. (Hay v. McDonald, 572.)
11. **PARTIES AND SIGNATURES—PAROL EVIDENCE.**—Where, in the body of an instrument, no words appear which serve to define the agreement as being made on behalf of a party other than he whose signature is attached thereto, it will not be deemed to be the contract of another party, even though there may appear after the appended signature of the individual, qualifying or descriptive words, such as "president," "secretary," or "cashier." In such cases parol proof is admissible to identify the party against whom the obligation is legally chargeable. (Id.)
12. **ADMISSIBILITY OF PAROL EVIDENCE—EXTENSION OF LIABILITY TO PRINCIPAL.**—The rule that where an agent contracts in terms not fully

CONTRACT (Continued).

expressing his representative capacity, parol evidence is admissible to show that it was understood by the parties that another person was intended to be bound, or that there was a principal wholly undisclosed or unknown to the opposite party, does not operate to allow an agent who contracts apparently in his own name to relieve himself of liability, but is a rule which extends to the other party the option of also proving a charge under the contract against the real principal. (Id.)

See Agency; Building Contract; Damages; Interest; Landlord and Tenant; Novation; Place of Trial, 1; Sale.

CONVERSION. See Attachment.**CORPORATION.**

1. **ISSUANCE OF STOCK—SERVICES PERFORMED—CONSIDERATION.**—Corporate stock issued in consideration of valuable services rendered and labor performed for the corporation is not issued without consideration. (Ellsworth v. National Home and Town Builders, 1.)
2. **MEETING OF STOCKHOLDERS CONTRARY TO BY-LAWS—ASSENT OF STOCKHOLDERS—LEGALITY OF ACTS.**—In an action to recover damages for conversion, based upon the refusal of a corporation to transfer to the plaintiff certain shares of its capital stock, which the plaintiff had acquired from a third party to whom the stock had been theretofore issued for services rendered and labor performed for the corporation, the defendant cannot contend that the issuance of the stock was unauthorized, on the ground that the stockholders' meeting at which the board of directors was elected who voted the issuance of the stock was held outside of the state under whose laws the corporation was created and in violation of the by-laws, where all the stockholders gave their consent to such meeting and participated in such election. (Id.)
3. **STOCKHOLDER'S LIABILITY—MONEYS LOANED—PLEADING—JOINDER OF CLAIMS.**—In an action to recover of a stockholder of a corporation his proportionate liability for moneys loaned to the corporation at various times while he was a stockholder, the plaintiff may, in a single action, join the claims on the various loans. (Clark v. Berlin Realty Company, 50.)
4. **COMPLAINT—INCORPORATION BY REFERENCE.**—In an action to recover of a stockholder of a corporation his proportionate liability, where there are several counts, allegations showing the liability on one count may, by reference, be incorporated in subsequent counts. (Id.)
5. **PROMISSORY NOTE—TAKING OF NEW NOTE—PAYMENT.**—The taking of a promissory note from a debtor, or of a third party, will not extinguish the debt and create a new obligation, unless received by

CORPORATION (Continued).

the creditor under an express agreement that it shall have that effect. (Id.)

6. **INSUFFICIENT EVIDENCE OF EXTINGUISHMENT OF NOTES.**—The taking of a new promissory note of a corporation by a bank for the amount of several loans of money made by the bank to the corporation, and the surrender to the corporation of the various notes previously given as evidence of the loan, is not conclusive evidence that it was the intention to thereby extinguish the note, so that a person who had ceased to be a stockholder of the corporation before the new note was taken was thereby freed from liability. (Id.)

7. **TRANSFER OF ASSETS FOR STOCK—AVOIDANCE OF FINANCIAL RUIN—LEGALITY OF TRANSACTION.**—A corporation, to save itself from financial ruin, may, in view of section 343 of the Civil Code, permitting corporations to acquire their own stock under the assessment scheme provided by law, make a transfer of its assets in consideration of a delivery to it of its own stock, without violating the provisions of section 309 of such code, declaring that directors of corporations shall not divide, withdraw, or pay to the stockholders any part of the capital stock. (Stewart v. Stewart Hotel Company, 167.)

8. **ACTION AGAINST CORPORATION AND STOCKHOLDER—LEGAL SERVICES—SEPARATE JUDGMENTS—LACK OF PREJUDICE.**—In an action for legal services brought against a corporation and a stockholder who owned all of the stock but two shares, the defendants are not prejudiced by the entry of a judgment in a fixed sum against each, since a payment of the judgment by the corporation would discharge the liability of the stockholder, and the payment by the stockholder of the amount adjudged payable by him would discharge the corporation *pro tanto*. (Taughen v. Richmond Dredging Company, 303.)

9. **ASSIGNMENT OF CORPORATION NOTE—AUTHORITY OF SALES AGENT.**—In an action on an assigned note, testimony of the agent who made the assignment on behalf of the corporation payee that he was the sales agent of the corporation, and as such had control of and possession of all books of account and evidences of indebtedness and all other matters in connection with the corporation's business in the southern end of the state, is sufficient to support the inference that the agent was authorized to make the assignment, although another person was president and general manager of the corporation. (Francis v. Independent Electrical Supply Co., 482.)

10. **CORPORATION LAW—GENERAL MANAGER OF ALL BUSINESS—APPOINTMENT OF DEPARTMENT MANAGER—AUTHORITY OF.**—The fact that a corporation has a general manager whose supervision extends to all of its business, does not exclude its right to vest in another agent the powers of a general manager representing the corporation in the conduct of some department of its business. The superintendent or manager of such department stands in the same relation to

CORPORATION (Continued).

the matters pertaining to his department as does the general superintendent or general manager to the general affairs of the company. (Id.)

11. **CONTRACT TO PURCHASE REAL PROPERTY—AUTHORITY OF AGENT.**—Where a corporation makes delivery of a sum of money to a person who had on one occasion acted as its agent in the sale of land, with instructions to use the money to bind the bargain on the purchase of certain real property which it desired to acquire, the vendor has the right to assume that such person possessed all necessary authority to complete the transaction, and the corporation cannot thereafter recover the money deposited on the ground of lack of authority of its agent to close the deal upon the terms embodied in the contract which he executed. (Maybury Ranch Company v. Devenney, 586.)

12. **CORPORATION LAW—PLEADING—DENIAL OF INCORPORATION UPON INFORMATION AND BELIEF—ISSUE NOT RAISED.**—In an action by a corporation the denial of the incorporation of the plaintiff upon information and belief is evasive and raises no issue, where the public record of incorporation was within reach of the defendant. (Brinkley-Douglas Fruit Company v. Silman, 643.)

13. **EVIDENCE—CORPORATE EXISTENCE.**—Corporate existence may be proved by parol, and, when collaterally assailed, it is sufficient to prove a *de facto* existence. (Id.)

14. **FRAUDULENT PROCUREMENT OF STOCK SUBSCRIPTION—RESCISSON—PECUNIARY DAMAGE.**—In an action by a corporation to recover an alleged balance due on a subscription for certain shares of its capital stock, where the defendant set up that his subscription was procured upon the false representation that a bank president, upon whose integrity and business capacity the defendant placed special reliance, was connected with the corporation, and sought rescission of the contract and recovery of the money paid, it is not necessary to aver or prove pecuniary damages. (Vulcan Fire Insurance Company v. Jorgensen, 763.)

15. **PROMPTNESS OF RESCISSION—EVIDENCE.**—The prompt rescission of a stock subscription contract is shown by evidence that immediately upon the discovery of the falsity of the representations, and within eight days of the making of the contract, the subscriber wrote to the president of the corporation repudiating the contract. (Id.)

16. **SUFFICIENCY OF NOTICE OF RESCISSION.**—In making rescission of such a contract, it is sufficient to state that the reason for the action was that the subscription had been obtained by misrepresentation on the part of the corporation's agent, without enumerating the misrepresentations specifically. (Id.)

17. **RETURN OF STOCK UNNECESSARY.**—Where a corporation merely undertakes to issue a certain number of shares of its stock upon the

CORPORATION (Continued).

payment of the balance of the purchase price, there is nothing for the purchaser to return in making a rescission of the contract. (Id.)

See Building and Loan Association; Contract, 3; Municipal Corporations; Place of Trial, 1; Quieting Title, 3; Statute of Limitations.

COSTS.

ANNULMENT OF JUDGMENT FOR CONTEMPT ON CERTIORARI—ALLOWANCE AGAINST JUDGE OR COUNTY UNAUTHORIZED.—Where a judgment for contempt of court is set aside on a *certiorari* proceeding, the petitioner is not entitled to have the costs incurred by him in the proceeding taxed against the judge nor allowed against the county, as such a proceeding is not the ordinary action to which sections 1027 and 1032 of the Code of Civil Procedure are applicable. (Platnauer v. Superior Court of Sacramento County, 394.)

COUNTY.

1. **CLASSIFICATION—USE OF STATE MONEYS.**—Counties are not municipal corporations or, strictly speaking, corporations of any kind, but are local subdivisions of the state, created by the sovereign power without the consent of the people who inhabit them, although they possess some corporate characteristics and may be within the inhibition of sections 22 and 31 of article IV of the constitution, against the drawing or appropriation of money from the state treasury for the benefit of a corporation or any institution not under the exclusive control and management of the state and against the making of any gift of such money to any individual or municipal or other corporation. (County of Sacramento v. Chambers, 142.)
2. **TUBERCULOSIS LAW—ACT CONSTITUTIONAL.**—The act (Stats. 1915, p. 1530) providing for the establishment and maintenance of a bureau of tuberculosis under the direction of the state board of health and granting state aid to counties for the support and care of persons afflicted with tuberculosis, is not violative of article IV, section 22, of the constitution, providing that no money shall be drawn or appropriated from the state treasury for the benefit of any corporation or institution not under the exclusive control and management of the state, or of article XI, section 13, providing that the legislature shall not delegate to a special commission the power to interfere with or supervise the affairs of counties, or of article IV, section 31, providing that the legislature shall not lend or authorize the lending of the credit of the state or of any county in aid of or to any person for the payment of any liabilities of any individual, etc. (Id.)
3. **EMPLOYMENT OF SPECIAL COUNSEL—DELEGATION OF AUTHORITY BY SUPERVISORS—LACK OF AUTHORITY.**—Under section 4041, subdivision 16, of the Political Code, which authorizes boards of supervisors

COUNTY (Continued).

to direct and control the prosecution and defense of all suits to which the county is a party and by a two-thirds vote of all the members, to employ counsel to assist the district attorney in conducting the same, the board has no authority to delegate to the district attorney or to any other person the right to employ special counsel, as the board alone is authorized to make the employment. (Conklin v. Woody, 554.)

4. **EMPLOYMENT OF COUNSEL IN CRIMINAL CASES—INCREASE OF COMPENSATION OF DISTRICT ATTORNEY.**—Under section 4041, subdivision 16, of the Political Code, it is beyond the power of a board of supervisors to subject the county to any expense for the employment of counsel to act in criminal cases, and moreover, by so doing, the compensation of the district attorney would be increased, which is forbidden by the constitution. (Id.)
5. **VITAL STATISTICS ACT—FEES OF LOCAL REGISTRARS—PAYMENT OUT OF COUNTY TREASURY—CONSTITUTIONAL LAW.**—The provisions of the Vital Statistics Act which impose upon the county treasury the burden of payment of a local registrar's fees are not violative of article XI, section 13, of the constitution, as an attempt on the part of the legislature to delegate to a private individual the power to appropriate and interfere with county money, nor are they violative of the provisions of article XI, section 12, taken with article XIII, section 14, of the constitution. (Boss v. Lewis, 792.)

See Costs; Place of Trial, 2.

COURTS. See Appeal, 2; Justice's Court; Juvenile Court.

CRIMINAL LAW.

1. **NEW TRIAL—FAILURE TO PRONOUNCE JUDGMENT WITHIN STATUTORY TIME.**—Under the provisions of sections 1191 and 1202 of the Penal Code, a defendant in a criminal action is entitled to a new trial, where an application for probation is made, and the time for hearing the application and for pronouncing judgment extended several times, and the application finally denied and judgment pronounced thirty-three days after the date of conviction. (People v. Gilbreth, 23.)
2. **REFUSAL TO POSTPONE TRIAL—DISCRETION NOT ABUSED—VERDICT SUPPORTED BY EVIDENCE.**—In this prosecution, it is held that the trial court did not abuse its discretion in denying the defendant's request for the postponement of the trial, and also, that the verdict and judgment are amply sustained by the evidence. (People v. Kitley, 197.)
3. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—In a criminal prosecution where alleged newly discovered evidence would have done no more than contradict the statements of some of the witnesses who testified at the trial, the trial court committed no error in refusing

CRIMINAL LAW (Continued).

to grant a new trial because of the discovery of such evidence. (People v. Yip Sing, 236.)

4. **APPEAL FROM JUDGMENT—INSUFFICIENCY OF EVIDENCE REVIEWABLE.** Upon an appeal from a judgment in a criminal action the insufficiency of the evidence to support the verdict is reviewable, as well as upon an appeal from an order denying a new trial. (People v. Clayton, 357.)

5. **PREPARATION OF RECORD—SUFFICIENCY OF NOTICE.**—In the taking of a criminal appeal it is not essential in the giving of the notice for the preparation of the record, as prescribed by section 1247 of the Penal Code, that any particular form of notice be given, as it is only necessary that the notice set forth in general terms the grounds of the appeal and the points relied upon, and designate the particular portions of the reporter's notes necessary to be transcribed to fully and fairly present such points. The efficacy of such a notice is not impaired by the statement of the appellant therein that he "thinks," or is of the "opinion," that all the testimony is necessary to the full and fair presentation of the points relied upon. (Id.)

6. **APPEAL—FAILURE TO FILE BRIEF OR APPEAR—RIGHT OF PROSECUTION.**—Where on a criminal appeal, the defendant fails to file any brief or to appear either by counsel or in person on the hearing of the appeal after notice to his counsel that the case had been placed on the calendar, the attorney-general has the right to submit the cause for determination upon the record. (People v. Maschini, 424.)

7. **CHANGE OF PLACE OF TRIAL—BIAS AND PREJUDICE—APPEAL.**—An application to change the place of trial of a criminal action on the ground that, owing to the bias and prejudice against the defendant throughout the county, the defendant could not have a fair and impartial trial therein, is addressed to the sound discretion of the trial court, and where error is assigned, a clear case should be shown by the record, or the appellate court will not interfere. (People v. Mabrier, 598.)

8. **IMPANELMENT OF JURY—DISCLOSURE OF FACTS WARRANTING RENEWAL OF MOTION—PROCEDURE.**—Where facts are disclosed at the impanelment of the jury which would warrant a renewal of the motion for a change of the place of trial, such renewal seems to be a proper proceeding. (Id.)

9. **EXAMINATION OF JURORS—UNWARRANTED INFERENCE OF BIAS.**—An inference of bias and prejudice against the defendant throughout the county is not warranted from the fact that ten out of thirty-nine talesmen examined in a county having a population of about six thousand were shown to possess such bias and prejudice. (Id.)

10. **OPINIONS OF JURORS—CONTRADICTORY ANSWERS—DUTY OF TRIAL COURT.**—In the impanelment of a jury where talesmen give contradictory answers to questions as to their ability to disregard opinions

CRIMINAL LAW (Continued).

which they have formed as to the defendant's guilt based upon newspaper reports and public rumors, it is the duty of the trial court to decide which of the answers most truly show the jurors' minds, and its decision is binding on the appellate courts. (Id.)

11. **EVIDENCE—CHANGE IN TESTIMONY—IMPEACHMENT—FOUNDATION.**—In a criminal action a witness who testified differently at the trial from what he testified to upon a former trial cannot be impeached by the introduction of his former testimony, where no foundation was laid for such impeachment while he was on the witness-stand. (Id.)
12. **INDICTMENT—SUFFICIENCY OF EVIDENCE—QUESTION NOT REVIEWABLE.**—While it is true that section 919 of the Penal Code provides that the grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence, and while it is also true that section 921 declares that such body ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction, yet, there is no method provided for revising the action of the grand jury in finding an indictment on the ground that there was not sufficient evidence to support it. (People v. Fealy, 605.)
13. **BURNING OF INSURED BUILDING — CONSPIRACY — EVIDENCE — STATEMENTS AND TRANSACTIONS OF CONFEDERATES.**—Where, in a prosecution for the crime of burning an insured building with intent to defraud the insurance company, the theory of the people at the trial was that the burning was the climax of a conspiracy concocted by the defendant, his wife, other members of his family and a third party, it is proper to admit conversations and transactions of the alleged conspirators relative to the conspiracy after its formation and before the consummation of its object, regardless of whether the defendant was present when they occurred. (Id.)
14. **DEFENDANT AS A WITNESS—IMPEACHMENT OF CHARACTER.**—Where a defendant in a criminal case testifies in his own behalf, he for the time being removes from himself the character of a defendant, and takes on that of a witness, and his character as a witness for truth, honesty, and integrity may be impeached like that of any other witness. (Id.)
15. **CONSIDERATION OF TESTIMONY OF DEFENDANT—EVIDENCE—HARMLESS ERROR.**—An instruction that the jury should fairly and impartially consider the testimony of the defendant, and if it produced conviction, they should act upon it, otherwise they might reject it, is not prejudicially erroneous, where the evidence of the defendant's guilt is clear and convincing. (Id.)
16. **CIRCUMSTANTIAL EVIDENCE—INSTRUCTION.**—An instruction that circumstantial evidence may consist of incriminatory admissions made by one accused of crime, plans laid for the commission of the crime by the accused, such as putting himself in a position to

CRIMINAL LAW (Continued).

commit it—in short, any act, declaration, or circumstance admitted in evidence tending to connect the accused with the commission of the crime—is not an instruction on matters of fact. (Id.)

17. ASSAULT WITH DEADLY WEAPON WITH INTENT TO MURDER—EVIDENCE—INSUFFICIENTLY IDENTIFIED WEAPON—LACK OF PREJUDICE. In a prosecution for the crime of assault with a deadly weapon with intent to commit murder, the defendant is not prejudiced by the admission in evidence of the pistol with which the prosecution claimed the assault was committed, even though the same was not sufficiently identified as the one which the defendant used, where it was admitted that he had a pistol at the time of the assault and that he discharged it. (People v. Grandi, 637.)

18. DEADLY CHARACTER OF WEAPON—SUFFICIENCY OF EVIDENCE.—In such a prosecution the deadly character of the weapon used is sufficiently proven by evidence of its discharge which was accompanied with a hissing sound. (Id.)

19. EVIDENCE—INTEREST OF WITNESS—PROCURING OF WRITTEN STATEMENT OF BAD REPUTATION OF ANOTHER WITNESS—ADMISSIBILITY.—In such a prosecution it is proper for the district attorney, for the purpose of showing that a witness for the defense had taken an unusual interest in the case in favor of the accused, to question the witness concerning the securing by him of a written statement of residents of the community declaring that the reputation of a witness for the state for truth was bad, but such statement is not admissible in evidence on motion of the defendant. (Id.)

20. PRESUMPTION OF GOOD CHARACTER OF DEFENDANT—INSTRUCTION.—The refusal to instruct the jury to the effect that a person accused of crime is presumed to have a good character until the contrary is established by competent evidence, and that it is the duty of the jury to give the defendant the benefit of such presumption, is not prejudicial, where the character of the accused for the traits involved in the charge upon which he was tried was not directly made an issue by the introduction of proof addressed thereto, and the jury was instructed that the defendant was to be presumed to be innocent until his guilt was confirmed by the evidence beyond all reasonable doubt. (Id.)

21. FAILURE TO STOP AND RENDER ASSISTANCE UPON AUTOMOBILE COLLISION—EVIDENCE—REPUTATION FOR KINDNESS AND GENTLENESS.—Upon a charge of violating section 367c of the Penal Code, requiring drivers of automobiles colliding with other vehicles to stop and render assistance to the occupants of the vehicle collided with and who may have been injured by such collision, it is within the proper bounds of cross-examination to ask witnesses produced by the defendant who had testified as to his good reputation for kindness and gentleness whether they had ever heard that the defendant had been arrested for picking chickens alive,—or that he had been

CRIMINAL LAW (Continued).

arrested for running down a boy or man, or that he had been arrested for unlawfully killing an elk. (People v. Fodera, 8.)

22. **PREVIOUS ARRESTS AND FINES FOR UNLAWFUL SPEEDING.**—No prejudicial error can be predicated upon the action of the district attorney in making, or of the court in permitting, inquiry as to whether the character witnesses for the defendant knew of his arrests and pleas of guilty and fines for unlawful speeding, where no assignment of misconduct was made to the questions, and there was no request for admonition or instruction to the jury to disregard the evidence. (Id.)

23. **SELLING OF STOLEN AUTOMOBILES—MISCONDUCT OF DISTRICT ATTORNEY—LACK OF PREJUDICE.**—No prejudicial error can be predicated upon the misconduct of the district attorney in asking the character witnesses called by the defendant as to whether they had heard it discussed that the defendant was under investigation by the police department for the selling of several stolen automobiles, where objections were sustained to the questions, no request made to the court to admonish or instruct the jury to disregard the misconduct, and the court of its own motion instructed the jury to disregard questions which contained insinuations against any party to the action. (Id.)

24. **VISITING MEMBERS OF BLACK HAND SOCIETY.**—Prejudicial error cannot be predicated upon the misconduct of the district attorney in asking a witness whether he ever heard discussed that on the day of the crime the defendant was visiting at the home of a person who had been arrested as a member of the Black Hand Society, where the defendant allowed the question and answer to stand and made no request for the jury to be instructed to disregard the same. (Id.)

25. **KNOWLEDGE OF COLLISION—ELEMENT IMPLIED—CONSTITUTIONALITY OF SECTION 367c, PENAL CODE.**—Section 367c of the Penal Code is not unconstitutional because it does not expressly embody in its phraseology words limiting its application to those persons who knowingly cause their vehicles to collide with those occupied by others, as the element of knowledge of the fact of the collision is necessarily to be implied from the requirements of the act to the effect that drivers of such vehicles must stop and render aid to those who may possibly have been injured in the collision. (Id.)

26. **DISCLOSURE OF NUMBER OF COLLIDING VEHICLE—NAME AND ADDRESS OF DRIVER.**—Such section is not unconstitutional in requiring the driver of a colliding vehicle to give the number of his machine and his name and address, as such requirement does not compel him to be a witness against himself in violation of section 13 of article I of the constitution. (Id.)

CRIMINAL LAW (Continued).

27. **FORGERY—FRAUDULENT INTENT—QUESTION FOR JURY.**—In a prosecution for the forgery of a check, the fraudulent intent of the defendant is a question to be determined by the jury. (People v. Kuhn, 319.)

28. **SUFFERING OF ACTUAL DAMAGE—NONESSENTIAL ELEMENT.**—In such a prosecution it is not necessary to sustain a conviction that the party whose name had been forged had suffered actual damage; it is only essential that it appear that if the manifest intent of the defendant culminated in success, such damage or detriment would follow. (Id.)

29. **MOTION IN ARREST OF JUDGMENT—DEMURRER.**—A motion in arrest of judgment challenges the sufficiency of the indictment or information to state a public offense, and the office of such a motion is neither more nor less than that of a demurrer. (People v. Wilbur, 511.)

30. **DRAWING OF CHECK—INTENT TO DEFRAUD—SUFFICIENCY OF INFORMATION.**—An information charging the offense defined by section 476a of the Penal Code, sufficiently states a public offense, where it is alleged, among other things, that the defendant wrote a check payable to himself, and delivered it to a third person with intent to defraud him, notwithstanding the check was not indorsed by the defendant. (Id.)

31. **GIST OF OFFENSE—FRAUDULENT INTENT.**—The gist of such an offense is in the fraudulent intent with which the check is drawn and delivered, and knowledge by the drawer and deliverer, at the time of such drawing and delivery, that he was then without assets of any kind or character in the bank upon which it was drawn to satisfy or meet it. (Id.)

32. **LEWD CONDUCT WITH MINOR—ATTEMPT TO COMMIT ACT—CONVICTION SUPPORTED BY EVIDENCE.**—In this prosecution for the felony defined by section 288 of the Penal Code, which punishes lewd and lascivious conduct with minor children, it is held that the evidence is sufficient to support the conviction of an attempt to commit the act charged. (People v. Smith, 195.)

33. **CRIMINAL LIBEL—INFORMATION—VENUE.**—In view of the provisions of section 9 of article I of the constitution that all criminal prosecutions for libels, indictments found, or information laid for publications in newspapers, shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, an information laid in a county other than that wherein the newspaper was published must allege that the party libeled resided in the county in which the action was brought in order to give the court jurisdiction of the offense. (People v. Wakao, 454.)

34. **RESIDENCE OF COMPLAINING WITNESS—KNOWLEDGE OF DISTRICT ATTORNEY.**—In a prosecution for criminal libel the district attorney

CRIMINAL LAW (Continued).

is presumed to know the residence of the complaining witness, and the defendant is not charged with such knowledge. (Id.)

35. **TIME OF COMMISSION OF OFFENSE—CONSTRUCTION OF STIPULATION OF COUNSEL.**—In a prosecution for selling alcoholic liquors in no-license territory, a stipulation entered into by counsel at the close of the people's case that the district mentioned in the indictment is no-license territory is sufficient to establish that the district was no-license territory at the time of the commission of the offense. (People v. Nolan, 493.)

36. **INTERPRETATION OF STIPULATIONS.**—The rules applicable to the construction of contracts generally govern the courts in their interpretation of stipulations, and such a construction will be placed upon them as will render them reasonable and just to both parties, and a construction that would make them frivolous and ineffectual avoided, if possible. (Id.)

37. **MURDER—VERDICT OF MANSLAUGHTER—ACCIDENTAL DISCHARGE OF GUN.**—In a prosecution for murder, a verdict of manslaughter is sufficiently supported by the admissions of the defendant, that at about the time the deceased was wounded a loaded rifle which the defendant was handling was accidentally discharged, and that while on his way for the doctor he went to his cabin, took the rifle and hid it where it was subsequently, and prior to his confession, found by an officer. (People v. Searle, 228.)

38. **CORPUS DELICTI—SUFFICIENCY OF EVIDENCE.**—In such a prosecution the *corpus delicti* is sufficiently proven, independently of the extrajudicial statements of the deceased, by evidence that deceased shortly after a shot was fired was found mortally wounded by a bullet, under circumstances that excluded any inference that the wound was self-inflicted. (Id.)

39. **PROOF OF KILLING—PRESUMPTION OF MALICE.**—In view of the fact that every killing is unlawful unless expressly excused or justified by law, where a homicide is shown, it is incumbent upon the defendant to prove circumstances in mitigation, excuse, or justification, unless they arise out of the evidence produced against him (Id.)

40. **VIEW OF SCENE OF CRIME BY JURY—PRESENCE OF DEFENDANT—WAIVER.**—While a defendant has the right to be present when the scene of the crime is being visited by the jury, he may waive such right, and such a waiver is shown where it is expressly stipulated by counsel that no one need accompany the jury except the sheriff. (Id.)

41. **MURDER—EVIDENCE—DYING DECLARATIONS.**—In a prosecution for the crime of murder, declarations made by the deceased immediately after being shot that he was done, that he was going to die, and

CRIMINAL LAW (Continued).

that he thought he was dead, indicate a sense of impending death sufficient to render them, together with certain other statements made at the same time, admissible as dying declarations. (People v. Gonzales, 340.)

42. **PREVIOUS THREATS—STRIKING OUT OF TESTIMONY—FOUNDATION NOT LAID.**—In a prosecution for the crime of murder there is no error in granting a motion to strike out testimony of previous threats made by the deceased, where at the time the motion was granted, no testimony had been introduced of any overt act or attack upon the defendant by the deceased. (Id.)

43. **HOMICIDE—WHEN JUSTIFIABLE.**—A homicide is not justifiable unless it is shown that the slayer was at the time of the killing in apparent imminent danger of losing his life, or of sustaining serious bodily injury, and previous threats, unaccompanied by some hostile act, do not afford such justification. (Id.)

44. **QUASHING OF INDICTMENT—AMENDMENT OF CODE—APPLICABILITY TO MOTION.**—The amendment of 1911 to section 995 of the Penal Code which took away the defendant's right on motion to set aside an indictment to urge any objection to grand jurors which would be good on challenge to the trial jury, either as to the panel or an individual juror, related to procedure, and its applicability to a motion made to quash an indictment filed after the amendment became effective accusing a defendant with the commission of a crime prior to the amendment does not deprive the defendant of any of his substantial rights. (People v. Schmidt, 426.)

45. **EX POST FACTO LAW—TIME.**—The time important to be taken into consideration in determining whether a law is *ex post facto* or not is the time and the state of the law at which the alleged offense was committed. (Id.)

46. **MOTION TO QUASH INDICTMENT—SUFFICIENCY OF EVIDENCE—MODE OF EXAMINATION OF WITNESSES BY GRAND JURY.**—A defendant on a motion to quash an indictment can only urge such grounds as are permitted him by section 995 of the Penal Code, and furthermore no inquiry can be made as to the sufficiency of the evidence or the mode of examining witnesses before the grand jury. (Id.)

47. **PROCEEDINGS BEFORE GRAND JURY—PRESENCE OF ALLEGED ILLEGALLY APPOINTED DEPUTY DISTRICT ATTORNEY—MOTION TO QUASH PROPERLY DENIED.**—An indictment is not subject to a motion to quash on the ground that persons other than those authorized by law were permitted to be present during the proceedings taken before the grand jury, where the alleged unauthorized person was one who had been appointed a deputy district attorney after the number of deputies who are allowed compensation by the statute had been appointed. (Id.)

48. **DISTRICT ATTORNEY—APPOINTMENT OF DEPUTIES.**—Under section 4230 of the Political Code, a district attorney may appoint as many

CRIMINAL LAW (Continued).

deputies as he chooses, but if he appoints any in excess of those for which compensation is provided to be paid from the public treasury, he must pay such deputies at his own expense, if they are to receive compensation. (Id.)

49. **CHALLENGES TO JURORS — ACTUAL BIAS — OPINIONS FOUNDED ON RUMORS AND NEWSPAPER STATEMENTS.**—In a prosecution for the crime of murder by dynamiting a building, it is not error to disallow challenges to jurors for actual bias, where it appeared from the answers given by them that the foundation for their opinions was public rumor, statements in public journals, and common notoriety, each declaring his ability to lay his opinion aside and consider the case against the defendant fairly and impartially. (Id.)
50. **REVERSAL FOR DISALLOWANCE OF CHALLENGES — NATURE OF EVIDENCE.**—On challenges to jurors for actual bias based on public rumor, statements in public journals, and common notoriety, in order to justify a reversal, the evidence given by the venireman upon his examination must be practically without conflict, and be so opposed to the decision of the trial court that the question becomes one of law. (Id.)
51. **CONSPIRACY — EVIDENCE.**—In proving a conspiracy it is not necessary that proof be made that the parties met and actually agreed to undertake the performance of the unlawful act, but a conspiracy may be shown by proof of facts and circumstances sufficient to satisfy the jury of the existence of the conspiracy, leaving the weight and sufficiency of the evidence to the triers of the questions of fact. (Id.)
52. **MURDER — DYNAMITING OF BUILDING — CONSPIRACY — EVIDENCE — ACTS AND DECLARATIONS OF CONSPIRATORS.**—In a prosecution for murder by dynamiting a building, where it is shown by overwhelming proof that a conspiracy had been organized on the part of a labor union and the work thereof prosecuted to the end that at every place in the United States where the open-shop was in force it was planned to use the weapon of nitroglycerin or dynamite to intimidate those opposed to the demands of the union, it was proper to show all of the acts, declarations, and correspondence had between the persons concerned, which referred to the means and methods employed and to be employed in furtherance of the common design, notwithstanding the defendant did not take an active part in the conspiracy until some time after a series of unlawful acts had been committed in other parts of the country. (Id.)
53. **EVIDENCE — SUITCASE CONTAINING INCRIMINATING ARTICLES.**—In such a prosecution a suitcase containing an alarm clock, a coil of black fuse, some blasting caps, a brass plate, some brass bars with screws, and copies of newspapers containing accounts of the destruction of the building, which was found in the checking-room at

CRIMINAL LAW (Continued).

a ferry station in another city several months after such destruction, was competent evidence, where the suitcase was identified as being one seen in the possession of one of the conspirators, and the clock and brass pieces were shown to be of a similar kind to those used by such conspirators. (Id.)

54. **EVIDENCE—DYING DECLARATIONS.**—Dying declarations as competent evidence are restricted to the cause of death and the circumstances immediately attending it as part of the *res gestae*. (People v. Gibson, 459.)

55. **MURDER—ABORTION—STATEMENT OF DEFENDANT—EVIDENCE—DYING DECLARATION.**—In a prosecution for murder resulting from the performance of an abortion, a statement made by the deceased about fifteen minutes before her death, that the defendant performed the operation on a stated date, and that he told her he had not lost a case in thirty years, followed by the declaration that she was dying, is admissible evidence as part of the *res gestae*, as it is fair to infer that the statement attributed to the defendant was made just before the operation. (Id.)

56. **CREDIBILITY OF WITNESSES—INSTRUCTION—APPLICABILITY OF TESTS TO TESTIMONY OF DEFENDANT.**—An instruction which submits the testimony of the defendant, who testified in his own behalf, to the usual and general tests of credibility in common with that of the other witnesses, is not erroneous. (Id.)

57. **MURDER—EVIDENCE—CONFESSION—CURE OF ERROR.**—In a prosecution for the crime of murder the defendant is not prejudiced by the alleged erroneous admission in evidence over his objection of a purported confession made by him to the district attorney, where he voluntarily became a witness in his own behalf and as such witness testified that he had heard his confession read to the court and that the facts were therein truly stated. (People v. Stockton, 467.)

58. **OMISSION TO PROVIDE FOR ILLEGITIMATE CHILD—STATUTE OF LIMITATIONS.**—A prosecution under section 270 of the Penal Code, which went into effect on August 8, 1915, for omitting to provide for an illegitimate child, is not barred by the one-year limitation provided by section 801 of such code, although the omission began at the child's birth, which was more than one year before the filing of the information charging the offense as having been committed after the statute went into effect, and within the statutory period of the year. (People v. Stanley, 624.)

59. **CONSTRUCTION OF STATUTE—CONTINUING OFFENSE.**—Under section 270 of the Penal Code, the offense of omitting to provide for an illegitimate child is in the nature of a continuing offense, and public policy requires such a construction of its terms as to render each and every willful omission without legal excuse to so provide a fresh offense, and so construed, the statute is no more *ex post facto*

CRIMINAL LAW (Continued).

in its intendment and effect than would any other statute be which made penal acts and conduct which were not so prior to its enactment. (Id.)

60. PROSECUTION OF FATHER OF ILLEGITIMATE CHILD—PREVIOUS ESTABLISHMENT OF DUTY TO SUPPORT—NONESSENTIAL REQUIREMENT.—Under section 270 of the Penal Code, the alleged father of an illegitimate child may be prosecuted for failure to support it without having his duty so to do established and directed in a civil action under section 196a of the Civil Code. (Id.)

61. PUBLIC TRIAL—WAIVER.—A defendant in a criminal action cannot claim that he was denied the right to a public trial where, at his own request, spectators were excluded and he concurred in the order made. (Id.)

62. ORDER OF EXCLUSION—RIGHT TO PUBLIC TRIAL NOT VIOLATED.—The right to a public trial is not violated when the order of the court excluding the public is sufficiently broad and flexible as to admit the officers of the court, the witnesses for the respective parties, the members of the bar, and all others who have a legitimate interest in the case, including relatives or friends of the defendant and of the complaining witness, and only excluding those who have no interest in the case. (Id.)

63. RAPE—CONVICTION OF ASSAULT TO COMMIT CRIME—EVIDENCE—APPEAL—HABEAS CORPUS.—A judgment of conviction of an assault to commit rape, which is not void on its face, cannot be nullified in a proceeding on *habeas corpus*, even though error was committed in admitting evidence of force under the information which charged statutory rape, as the remedy for the correction of such error is by appeal. (Matter of Drennan, 193.)

64. RAPE—INDICTMENT—ACCOMPLISHMENT OF ACT—DEFECTIVE AVENEMENT—LACK OF PREJUDICE.—An indictment charging the crime of rape which uses the word "accomplish," instead of "accomplished," or "did accomplish," in describing the act charged, while grammatically defective, is not prejudicial to the defendant. (People v. Slaughter, 365.)

65. JURY—SUMMONING OF SPECIAL VENIRE—LACK OF PREJUDICE.—In such a prosecution the defendant was not prejudiced by the summoning of a special venire of jurors before the regular panel was exhausted, where all jurors on the latter panel were examined before any name was drawn from the special venire. (Id.)

66. DISALLOWANCE OF CHALLENGE—PEREMPTORY CHALLENGES NOT EXHAUSTED—LACK OF PREJUDICE.—Where a defendant has not exhausted his peremptory challenges he is not prejudiced by the disallowance of a challenge for cause, even if the disallowance is erroneous. (Id.)

CRIMINAL LAW (Continued).

67. **IMPEACHMENT OF PROSECUTRIX—RIGHT TO EXPLAIN LETTERS AND AFFIDAVIT.**—In a prosecution for rape the prosecutrix may explain how she happened to make an affidavit and to write letters denying the accusations which she made against the defendant in her direct examination, which were offered in evidence on her cross-examination for impeachment purposes. (Id.)

68. **COMMISSION OF SIMILAR ACTS—PROOF OUT OF ORDER—LACK OF PREJUDICE.**—Where in such a prosecution the particular act relied upon for a conviction was stated at the beginning of the trial, it is not error to permit the introduction in evidence out of order of the commission of similar acts. (Id.)

69. **COMMISSION OF SEPARATE OFFENSES ON SAME DAY—INSTRUCTIONS.** Where in such a prosecution there was evidence of the commission of two offenses on the same day, an instruction authorizing a conviction if the jury believed the offense occurred at any time on such day is not erroneous, where by another instruction such general language was limited to the particular offense upon which a conviction was asked. (Id.)

70. **PROBABILITY OF COMMISSION OF ACT—SIMILAR ACTS—INSTRUCTION.**—An instruction that the jury might consider previous acts similar to the one charged in the indictment as tending to show the disposition of the defendant toward the prosecutrix, and for the purpose of ascertaining whether it was probable that the act charged was committed, is not erroneous as authorizing a conviction upon a probability of guilt. (Id.)

71. **PROOF OF FACT—TESTIMONY OF SINGLE WITNESS—INSTRUCTION.**—An instruction that the testimony of one witness is sufficient to establish any fact necessary to be proved if believed by the jury beyond a reasonable doubt, is not erroneous, although awkwardly expressed. (Id.)

72. **REQUEST FOR READING OF TESTIMONY—VERDICT WITHOUT WAITING FOR—LACK OF PREJUDICE.**—The defendant in a criminal action is not deprived of any substantial right to which he is entitled under section 1138 of the Code of Civil Procedure, where the jury after several hours' deliberation requested that a certain portion of the testimony be read to them, and upon being informed that it would take some time to locate it, expressed an opinion that they might reach a verdict without it, which they did. (Id.)

73. **RAPE—EVIDENCE—UNCORROBORATED TESTIMONY OF PROSECUTRIX.**—In a prosecution for rape the uncorroborated testimony of the prosecutrix is sufficient to warrant a conviction. (Id.)

74. **RAPE—EVIDENCE—COMPLAINT TO THIRD PERSON.**—In a prosecution for the crime of rape committed by a father with his seventeen-year old daughter, a witness may testify that the prosecutrix complained of the act to him, but not the detail of it, regardless of the fact that she was under the age of consent. (People v. Lopez, 530.)

CRIMINAL LAW (Continued).

75. NATURE OF CHARGE—FACILITY TO INVENT—INSTRUCTION.—In a prosecution for rape, the defendant is not prejudiced by the refusal to give an instruction warning the jury as to the danger of prosecutions for rape being used to satisfy malice or private vengeance, and declaring that in such cases the accused is almost defenseless, in view of the facility with which such charges may be invented and maintained, where the jury was fully and carefully instructed on reasonable doubt. (Id.)

76. RAPE—EVIDENCE OF PRIOR ACTS.—In a prosecution for the crime of rape, evidence of the commission of prior acts is admissible upon the theory that the same tends to show the lewd and lascivious tendencies and disposition of the prosecutrix and defendant. (People v. Marino, 448.)

77. EVIDENCE OF PRIOR PREGNANCY AND ABORTION.—In a prosecution of a father for rape upon his seventeen year old daughter, evidence that when the prosecutrix was about fourteen years of age she became pregnant as the result of an act of sexual intercourse with her father, and when she informed him that "she did not get her monthlies," he stated that he knew what was the matter with her and took her to a doctor, who performed an abortion, is admissible for the purpose of showing that the defendant's conduct when informed of the interruption of the daughter's menstrual periods was tantamount to an admission that he knew she was pregnant, and that he was the cause thereof. (Id.)

78. PENETRATION OF SEXUAL ORGANS—INSTRUCTION.—In such a prosecution, while it was improper to refuse to instruct the jury that the defendant should not be convicted unless it could be said after consideration of all the evidence that the defendant had penetrated the sexual organs of the prosecutrix, the defendant was not prejudiced by such refusal, where the jury were instructed in accordance with section 261 of the Penal Code defining the crime of rape to be an act of sexual intercourse accomplished with a female not the wife of the defendant, when the female is under the age of eighteen, since the phrase "sexual intercourse" implies actual penetration. (Id.)

CUSTOM. See Sale, 8.

DAMAGES.

1. CONTRACT FOR DRILLING OF OIL WELLS—BREACH BY LAND OWNER—DAMAGES—LOSS OF PROFITS—PLEADING.—In an action by a contractor against a land owner to recover damages for breach of a contract for the drilling of oil wells, the profits on the contract are not too speculative and remote to be a basis for damages, and are recoverable without being specially pleaded. (Robinson v. Rispin, 536.)

DAMAGES (Continued).

2. **CONTRACT—LIQUIDATED DAMAGES—DECLARATION IN INSTRUMENT.**—A declaration in a contract that the actual damages to be suffered from a breach would be difficult to ascertain, and that the parties were making provision for liquidated damages in lieu of actual damages, tends strongly to establish the fact required by the statute to exist, and tends to control the question as to whether the provision is one for liquidated damages or for a penalty, where the contract appears upon its face to be one allowed by the terms of section 1671 of the Civil Code. (*Consolidated Lumber Company v. City of Los Angeles*, 698.)
3. **CONTRACT FOR PURCHASE OF LUMBER—DAMAGES FOR DELAY IN DELIVERY—DECLARATION IN CONTRACT CONCLUSIVE.**—In a contract for the purchase of a large quantity of lumber to be used in the construction of a municipal wharf, providing that the city might deduct from the contract price the sum of fifty dollars per day for each day that delivery was delayed, a declaration in the contract that the actual damages to be suffered from such a delay would be difficult of ascertainment, and that the parties were making provision therein for liquidated damages, tends strongly to establish the fact of the impracticability or extreme difficulty of fixing the actual damages, and such declaration is controlling, in the absence of evidence negativing the declaration. (*Id.*)

See Appeal, 9; Assault and Battery; Contract, 8, 9; Guaranty, 2, 3; Injunction; Landlord and Tenant, 2, 3, 6, 7; Vendor and Vendee, 5.

DEED. See Quieting Title.

DEFAULT. See Judgment, 1, 4, 5.

DEMAND. See Contract, 5, 6.

DEPOSITION.

1. **FAILURE TO ATTACH SEAL OF COURT—AMENDMENT AND ADMISSION IN EVIDENCE.**—A deposition of a witness taken out of the state upon a commission which did not have attached to it the seal of the court as required by section 2024 of the Code of Civil Procedure is subject to amendment by affixing the seal thereto, and properly read in evidence, upon a showing that the witness was no longer at the place where the deposition was taken, but somewhere in a foreign country, and that to have the deposition again taken would cause an indefinite delay of the action. (*Marvin v. Eng-Skell Company*, 42.)
2. **AMENDMENT OF PROCESS—DUTY OF COURT.**—A court has control over its process, and it should permit an amendment to the same

DEPOSITION (Continued).

in the interests of justice, and especially where the complaining party can show no resulting injury. (Id.)

3. **SUBPOENA — ATTENDANCE BEFORE COMMISSIONER — JURISDICTION.**—Under the provisions of subdivision 3 of section 1986 of the Code of Civil Procedure, a subpoena issued by the clerk of the superior court upon the order of the court or a judge thereof, requiring the attendance of a witness before a commissioner or other officer for the purpose of giving his deposition, has the same territorial force and effect as a subpoena issued by the clerk requiring the attendance before the court, and such subpoena may require the attendance of a witness even though he resides outside the county but within the fifty-mile limit. (*Merrill v. Superior Court*, 55.)
4. **DISOBEDIENCE OF SUBPOENA — CONTEMPT — HEARING AND NOTICE ESSENTIAL.**—In view of the provisions of section 1991 of the Code of Civil Procedure, the superior court cannot punish a witness for contempt for failure to obey a subpoena commanding him to appear before an officer for the purpose of giving his deposition until a report has been made to the court of such disobedience and a hearing had, and an order made directing the witness to obey the subpoena. (Id.)

DISTRICT ATTORNEY. See *County*, 8, 4; *Criminal Law*, 48.

DIVORCE.

1. **SETTLEMENT OF PROPERTY RIGHTS — SUPPORT OF MINOR CHILD.**—Where pending a suit for divorce the parties entered into an agreement for settlement of their property rights, the property being the separate property of the husband, in which agreement the wife was to take the custody of the minor child and support him and receive in consideration thereof in full of all her claims to the property, a certain sum, the decree in her favor embodying an order in accordance with the agreement, there was no abuse of discretion in the court's denying a later application for an allowance from the husband for the support of the child, where it appeared that the wife still had on hand most of the money received in the settlement, which was in a form available for the support of the child, and it further appeared that the husband had fully performed the contract. (*Rolleri v. Rolleri*, 233.)
2. **AWARD OF CUSTODY OF MINOR — JUDGMENT — VALIDITY IN OTHER STATES.**—The doctrine of comity between the states of the Union requires that a judgment granting a divorce and awarding the custody of a minor child rendered by a court of one state shall be conclusive in the jurisdiction of the other states, in the absence of a showing of changed conditions affecting the welfare of the child. (*Matter of Wenman*, 592.)

DIVORCE (Continued).

2. VIOLATION OF DECREE OF FOREIGN STATE—DUTY OF COURTS OF THIS STATE.—Upon an application for a writ of *habeas corpus* to recover the custody of a minor child brought into this state by its mother, in direct violation of the terms of a decree of a court of competent jurisdiction of another state awarding its custody to the petitioner, a due respect for the orderly administration of the law, and according to the doctrine of comity, requires the courts of this state to recognize the right of the petitioner under the decree of the foreign court, in the absence of any showing that since the entry of the decree the petitioner had become an unfit or unsafe person to have the care and control of the minor. (Id.)

DRAINAGE DISTRICT.

1. DRAINAGE ACT—DISPOSITION OF BONDS—CONSTRUCTION OF ACT—REPUGNANCY OF PROVISIONS.—The act of the legislature entitled "An act to promote the drainage of wet, swamp, and overflowed lands, and to promote the public health in the communities in which they lie," approved March 21, 1903 (Stats. 1903, p. 354), as amended in 1915 (Stats. 1915, p. 359), is not invalid because of the repugnancy existing between sections 8d and 8e, as to the disposition to be made of the bonds to be issued by the county to represent the cost of the work, when the language of the whole act is considered, as upon such a consideration it is apparent that it was the intent of the legislature that payment for the work should be in bonds equal to the amount of the contractor's bid, plus such sum as he, under all the requirements of the act, should advance in payment of all incidental expenses connected with the work, delivered by the treasurer to the contractor or his assignees as provided by section 8d, and not that they should be sold by the board of supervisors as provided by section 8e. (Van De Water v. Pridham, 252.)

2. CONSTRUCTION OF DRAINAGE CANAL THROUGH STREETS OF MUNICIPALITY—CONSENT OF CORPORATION—VALIDITY OF ORDINANCE.—A municipal corporation operating under a freeholders' charter, which vests in the city plenary control of all uses of its streets, has the power to enact an ordinance giving the board of supervisors of a drainage district permission to construct a drainage canal through certain specified streets; and without regard to the character of the charter, the consent of the legislative body of the city is a prerequisite condition to extending the drainage canal through the streets of the municipality. (Id.)

3. CONSTRUCTION OF DITCH THROUGH CITY STREETS—CONSENT UPON TERMS—VALID ORDINANCE.—An ordinance granting consent of a municipal corporation to the construction of a drainage ditch through its streets is not rendered a nullity by reason of the fact that such consent was upon certain terms named in the ordinance,

DRAINAGE DISTRICT (Continued).

which were protective of public interest, germane to the subject, and violative of no provision of the Drainage District Act. (Id.)

4. **DOING OF WORK—PUBLIC BENEFIT—SILENCE OF STATUTE—VALIDITY NOT AFFECTED BY.**—The Drainage Act of 1903 is not void by reason of its failure to provide in direct terms that the doing of the work shall depend upon its being a public benefit, in view of section 4 of the act which makes the determination of the board to proceed with the hearing therein referred to presumptive evidence of the existence of all facts upon which the power of the board to proceed depends. (Id.)
5. **LOS ANGELES COUNTY FLOOD CONTROL ACT—DRAINAGE ACT NOT SUPERSEDED BY.**—The Drainage Act of 1903 has not been superseded in Los Angeles County by the act of 1915 entitled "An act to create a flood control district, to be called 'Los Angeles county flood control district,'" (Stats. 1915, p. 1502), as the purpose of the Drainage Act is to dispose of the water and get rid of it as an injurious element, while the purpose of the County Flood Control Act is to conserve the water as a beneficial agent. (Id.)

ELECTIONS.

1. **ELECTION LAW—DEFECTIVE AFFIDAVITS OF REGISTRATION—ACCEPTANCE BY CLERK—PART OF GREAT REGISTER—CANCELLATION UNAUTHORIZED.**—Where in the preparation of an affidavit of registration for election purposes, the county clerk failed and neglected to enter in the affidavit the fact that the affiant could read the constitution in the English language, and could write his or her name, which in fact he could do, such officer, by receiving the affidavit and accepting it for registration purposes, and by holding it in his office together with the other affidavits of registration constituting the great register of the county, without objecting to its sufficiency when presented and received by him, thereby makes the same a part of the great register, and is without power to thereafter cancel the affidavit or to withhold the same from use in an election. (Pohlmann v. Patty, 390.)
2. **CANCELLATION OF REGISTRATIONS—CONSTRUCTION OF CODE.**—Section 1106 of the Political Code, which sets forth the instances in which it is made the duty of the county clerk to cancel entries of registration of voters, does not include the cancellation of affidavits of registration on account of failure of the affidavits to contain answers to questions as to whether the person being registered could read the constitution in the English language or write his or her name, which, under section 1097 of such code, should have been answered in the affidavits, as the provisions of the latter section are directory and not mandatory. (Id.)
3. **ELECTION LAW—CANCELLATION OF REGISTRATION OF VOTERS—PARTIES TO ACTION—PROHIBITION.**—In an action brought by electors under

ELECTIONS (Continued).

section 1109 of the Political Code to compel a county clerk to cancel certain registrations of voters, such voters are necessary parties defendant under section 1111 of such code, and the court is without jurisdiction, in an action wherein the county clerk is the sole party defendant, to render a valid judgment of cancellation, and prohibition will lie to restrain the superior court from proceeding with the action until such voters are made defendants and served with lawful process. (Ash v. Superior Court, 800.)

EMINENT DOMAIN.

LANDS FOR RAILROAD USES—PUBLIC NECESSITY FOR TAKING—PROOF NOT REQUIRED.—In view of section 465 of the Civil Code, which expressly grants to railroad corporations the right to acquire lands by condemnation proceedings to be used in the construction and maintenance of their roads, and of section 1238 of the Code of Civil Procedure, which expressly provides that railroads are public uses in behalf of which the right of eminent domain may be exercised, the question as to whether there is a present public need for the construction and operation of the particular railroad seeking to exercise that right is no longer a judicial question to be litigated in the condemnation proceeding, except to the extent that a private person whose lands are sought to be taken may put in issue the good faith of the railroad corporation in seeking to acquire his land for uses which are not public, but really to subserve some private interest or end. (Castro Point Railway & Terminal Company v. Anglo-Pacific Development Company, 418.)

EMPLOYER AND EMPLOYEE.

MASTER AND SERVANT—COMPENSATION FOR SERVICES—UNAUTHORIZED RETENTION OF COLLECTED MONEYS.—In an action by a corporation to recover sums of money collected by an employee from debtors of the corporation, he cannot set up as a defense that he had the right to retain such moneys under a claim of increased compensation for his services, where such claim was based upon a notice demanding such an increase to which the corporation never gave its assent, notwithstanding the defendant continued to serve the corporation after the giving of such notice, and the corporation made no objection thereto. (Connell Company v. Jenner, 350.)

See Negligence, 1, 7-15, 18, 19; Workmen's Compensation Act.

EQUITY. See Injunction; Quietting Title; Specific Performance; Taxation, 1, 2; Trust.

ESTATE OF DECEASED PERSON. See Judgment, 8.

ESTOPPEL. See *Agency*, 3; *Husband and Wife*, 6; *Landlord and Tenant*, 11; *Mechanic's Lien*, 4; *Quieting Title*, 3; *Vendor and Vendee*, 2.

EVIDENCE.

CHILD WITNESS—DETERMINATION AS TO COMPETENCY—DISCRETION—APPEAL.—In determining the competency of a child under the age of ten years to be a witness, the trial court has a discretion which seldom will be interfered with on appeal. (People v. Lopez, 530.)

See *Agency*, 7; *Appeal*, 1, 8, 13; *Building Contract*, 3; *Contract*, 1, 3, 10-12; *Corporation*, 13; *Criminal Law*, 3, 11-19, 21-24, 38-42, 46, 51-57, 63, 67-74, 76, 77; *Deposition*; *Landlord and Tenant*, 5, 13, 18; *Mechanic's Lien*, 5; *Negligence*, 2-4, 11, 23; *New Trial*; *Novation*; *Sale*, 8, 10, 12.

EXCHANGE.

EXCHANGE OF REAL PROPERTY—RECOVERY OF MONEY PAID—INABILITY TO PERFORM—SUPPORT OF FINDING—APPEAL.—In an action to recover a sum of money paid under an agreement for an exchange of real property, which provided that if the other contracting party was unable to comply with the terms of the agreement within a reasonable time, and within thirty days from the date of the payment of the money, the amount was to be returned without interest, a finding of such failure, and that the inability to perform was not owing to any conduct of the plaintiff, will not be disturbed on appeal, where there was evidence to support it, regardless of whether the same was established by a preponderance of the evidence. (Smalley v. Holt, 589.)

EXECUTION.

1. **SUPPLEMENTAL PROCEEDINGS—ACTION FOR RECOVERY OF PROPERTY AGAINST ADVERSE CLAIMANT—TIME OF MAKING ORDER.**—Upon proceedings supplemental to execution, where it appears that the person examined has property belonging to the debtor in which he claims an adverse interest, it is immaterial whether the order authorized by section 720 of the Code of Civil Procedure, giving the judgment creditor leave to maintain an action for the recovery of the same, be made at the time of the examination or a few days afterward. (Pioneer Investment and Trust Company v. Muncey, 740.)
2. **RESTRAINT OF DISPOSITION OF PROPERTY PENDING SUIT—LACK OF SECURITY—CODE PROVISION CONSTITUTIONAL.**—The provision of section 720 of the Code of Civil Procedure, authorizing the court in giving leave to maintain such an action to restrain the transfer or other disposition of the property pending the determination of the action, is not unconstitutional, because of the omission to make provision therein for security. (Id.)

FACTOR See *Pledge*, 1, 2.

FALSE IMPRISONMENT.

MISCONDUCT OF COUNSEL—IMPROPER REFERENCE TO FAILURE TO TESTIFY—VERDICT—LACK OF PREJUDICE.—In an action for false imprisonment instituted against certain members of a city police department, a remark made by plaintiff's counsel in his closing argument that the reason why two of the defendants did not appear and testify was because if they had so appeared the plaintiff would have picked them out as the officers who had called upon her to get hush money to permit her to pursue the illicit vocation of prostitution, was not prejudicial, where the arrest was illegal, and the action for twenty-five thousand dollars damages and the verdict for five hundred dollars. (*Fiori v. Agnew*, 284.)

FINDINGS.

ISSUES—WHEN IMMATERIAL.—Where the matters which are found necessarily defeat the plaintiff's right of recovery it is unnecessary that the findings should dispose of any further issues, as all other issues thereby become entirely immaterial. (*White v. Hayward*, 550.)

See *Appeal*, 1, 7; *Juvenile Court*; *Quieting Title*, 5, 6.

FORCIBLE ENTRY AND DETAINER.

1. **FORCIBLE ENTRY—FINDING—INSUFFICIENCY OF EVIDENCE.**—In an action for forcible entry to recover the possession of a tract of land, a finding of the making of such an entry as is defined in section 1159 of the Code of Civil Procedure is not sustained, in the absence of any evidence of violence, offer of violence, or show of superior force attendant upon the entry of the defendant upon the land. (*Ingram v. Slayton*, 630.)
2. **TITLE OF DEFENDANT—WHEN IMMATERIAL.**—Where, in such an action it is shown that at the time of the defendant's entry the plaintiff was in the actual peaceable possession of the land, the question of the defendant's title is not material to recovery, for one who enters where actual possession has been acquired by another, may do so only in a peaceable way or under authority of a judgment of court, excepting where he enters under some form of permission given by the occupant. (*Id.*)

FORFEITURE. See *Landlord and Tenant*, 11; *Vendor and Vendee*, 2.

FORGERY. See *Criminal Law*, 27, 28.

FRAUD.

ACTION FOR RESCISSION OF CONTRACT OF EXCHANGE—NONRELIANCE UPON ALLEGED MISREPRESENTATIONS—FINDING SUPPORTED BY EVIDENCE.—In an action to rescind an executed contract of exchange of real

FRAUD (Continued).

property for secured notes, a finding that the plaintiff did not rely upon the misrepresentations claimed to have been made by the defendant concerning the property is supported by evidence that the plaintiff spent considerable time in making an independent investigation of the property, although she testified that she did rely upon the representations made. (*White v. Hayward*, 550.)

See *Criminal Law*, 30, 31; *Insurance*, 4, 5; *Public Lands; Sale*, 2, 3, 9; *Surety*.

FRAUDULENT CONVEYANCES.

TRANSFER OF RIGHT TO PLANT CROP—CHANGE OF POSSESSION—CODE SECTION INAPPLICABLE.—Where the owner of a leasehold interest in a tract of land makes a transfer to his sons of the right to plant a crop of barley on the land, and the sons go into possession and continue in possession of the land until after the crop is harvested, the transfer is not presumptively void as to creditors of the lessee under section 3440 of the Civil Code, which provides that every transfer of personal property is conclusively presumed to be fraudulent, as against the creditors of the transferrer, unless accompanied by an immediate delivery and followed by an actual and continued change of possession. (*Fissell v. Monroe*, 756.)

GIFT. See *Trust*, 1, 2, 13, 14.

GOODWILL. See *Sale*, 4, 5.

GUARANTY.

1. **PLEADING—PRIMARY OBLIGATION OF PRINCIPALS.**—In an action on a contract of guaranty given to secure the payment of rent, the complaint shows no right of recovery, where the facts stated do not show a primary obligation against the lessees corresponding to the obligation of guaranty. (*Stephens v. Daugherty*, 733.)

2. **DEFAULT IN PAYMENT OF RENT—RECOVERY OF LIQUIDATED DAMAGES—INSUFFICIENT COMPLAINT.**—In an action on a guaranty to recover the amount stipulated as liquidated damages for failure of the lessees to pay the rent reserved in a lease, the complaint is insufficient where it is not alleged, or shown by the alleged facts that it would have been impracticable or extremely difficult to fix the actual damages accruing to the plaintiffs. (*Id.*)

3. **SURRENDER OF POSSESSION—PLEADING AND EVIDENCE—ACTUAL DAMAGES.**—In an action on a contract of guaranty of payment of rent brought after surrender of possession of the demised premises, it is necessary for the lessor to plead and prove the amount of the actual damages suffered by him and coming within the terms of the bond. (*Id.*)

See *Landlord and Tenant*, 15.

HABEAS CORPUS. See Criminal Law, 63.

HUSBAND AND WIFE.

1. **ACTION FOR MAINTENANCE—JOINDER OF GRANTEES OF COMMUNITY PROPERTY—UNAUTHORIZED JUDGMENT.**—In an action for maintenance wherein the wife joined as parties defendant with her husband his father, mother, and brother, upon the theory that they had, by means of a fraudulent conspiracy with the husband, acquired certain real estate alleged to be community property of the spouses and thus deprived her of her interest therein, a judgment that the plaintiff do have and recover from such defendants a stated sum of money, found to be one-half of the proceeds of the property so acquired, is unwarranted, in the absence of any finding of fraud, and where the evidence shows without substantial contradiction that they paid full value for the property. (Johnson v. Johnson, 93.)
2. **ATTORNEY'S FEES—UNAUTHORIZED JUDGMENT.**—In such an action a judgment awarding the plaintiff attorney's fees against such defendants, as well as the husband, is likewise unwarranted. (Id.)
3. **AWARD OF COMMUNITY PROPERTY—LACK OF JURISDICTION.**—In an action for maintenance without divorce, the court is without jurisdiction to award any community property to the wife, as the husband is entitled, until the marriage is dissolved, to the control of the community property with absolute power of disposition other than testamentary, except that he cannot make a gift thereof without her written consent. (Id.)
4. **PURPOSE OF ACTION.**—The purpose of the suit for separate maintenance is to specifically enforce the general duty of the husband by directing certain definite payments to be made at regular intervals for the wife's support, and, subject to such provisions, their relations to each other and to the community estate is precisely the same as though no such action had been brought or an award made. (Id.)
5. **SEPARATION CONTRACT—RECOVERY OF MONTHLY PAYMENTS—WAIVER—EVIDENCE—APPEAL.**—In an action to recover upon an agreement made between a husband and wife, providing for their living apart, the dismissal of a pending action for separate maintenance and the payment to the wife of a stated monthly sum so long as they should remain married, the finding of the trial court upon sufficient evidence that the wife had not waived her right to such payments is conclusive on appeal. (Ward v. Goetz, 595.)
6. **ESTOPPEL—PLEADING.**—In such an action, where it is claimed that the wife was estopped to claim such payments, it is essential that the estoppel be pleaded. (Id.)
See *Divorce*.

ILLEGITIMATE CHILD. See Criminal Law, 58-62; *Parent and Child*.

INFANT. See Juvenile Court.

INJUNCTION.

1. **TEMPORARY RESTRAINING ORDER—DAMAGES—ATTORNEY'S FEES.**—In an action prosecuted for the purpose of obtaining damages alleged to have been sustained by reason of the restraint imposed under a temporary restraining order in an action for injunctive relief, the court properly determined that no attorney's fees were incurred as damages by reason of the order, where it did not appear from the evidence taken, as set out in the reporter's transcript, that any motion was made to dissolve the order, but that the whole of the efforts of the restrained party were directed to resisting the order to show cause, during the pendency of the hearing of which order, the temporary restraining order was made, and which fell of its own weight at the time fixed for the hearing of the order to show cause. (Warden v. Choate, 354.)
2. **LOSS OF SALE OF LOT—PLEADING AND EVIDENCE—DAMAGES NOT ALLOWABLE.**—In such an action damages are not properly allowable for loss alleged to have been sustained on account of the inability of the plaintiffs to accept an offer to purchase a certain lot due to the fact that they had been prevented from obtaining a deed thereto by the restraining order, where there was no allegation in the complaint or evidence that the lot was worth any less after the restraining order had become of no effect than it was at any time during the pendency of the restraint imposed by the order. (Id.)

See Vendor and Vendee, 9.

I. O. U. See Contract, 10-12.

INSTRUCTION. See Criminal Law, 16, 20, 56, 69-71, 75, 78; Negligence, 5, 17, 22.

INSURANCE.

1. **INDEMNITY AGAINST DAMAGES FROM ACCIDENTAL INJURIES—ACTION UPON POLICY—CONTROL OF LITIGATION BY INSURER—RECOGNITION OF LIABILITY.**—Where an insurance company, acting under the terms of a policy indemnifying the insured against loss and expense arising for damages accidentally suffered by reason of the operation of elevators in an apartment house, takes charge of and assumes exclusive control of an action brought against the insured for damages for injuries from such an accident, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment not exceeding the amount stipulated in the policy. (Rodgers v. Pacific Coast Casualty Company, 70.)
2. **JUDGMENT—PAYMENT BY NOTE.**—Under the terms of an indemnity insurance policy which promises to indemnify for loss paid by the

INSURANCE (Continued).

assured, the satisfaction of a judgment procured by the giving of a promissory note is to be deemed payment of the judgment debt. (Id.)

- 3. PROCURING OF POLICY BY UNLICENSED AGENT—VIOLATION OF STATUTE—LIABILITY OF INSURER.**—A life insurance company cannot, by violating the provisions of section 633 of the Political Code, which declares that no person shall in this state act as the agent or solicitor of any insurance company doing business herein until he has produced to the commissioner, and filed with him, a duplicate power of attorney from the company, or its authorized agent, authorizing him to act as such agent or commissioner, absolve itself from liability on a contract that it has authorized or ratified, although the contract may have been secured by a person not an agent or solicitor in the full meaning of the statute. Such statutory provisions as to agents do not change the rule of law as to principal and agent between the company and the policy-holder, and the company attempting to evade such statute is nevertheless bound to its policy-holders as though the statute had been complied with. (Goldstone v. Columbia Life & Trust Company, 119.)
- 4. FALSE ANSWERS IN APPLICATION—FRAUD OF AGENT—RECOVERY ON POLICY.**—Where false answers are written in an application for life insurance, it is the duty of the insured after delivery of the policy to notify the insurer of the fraud, and where the same is not done, the fraudulent act of the agent is thereby approved, and no recovery can be had on the policy. (Id.)
- 5. REPUDIATION OF FRAUD—DUTY OF INSURED.**—A delay of four months in repudiating the fraud of the agent is fatal to recovery, as it is the duty of the insured to act promptly. (Id.)
- 6. FIRE INSURANCE—CANCELLATION OF POLICY—MISSTATEMENT OF GROUNDS.**—Where a policy of fire insurance gives the insured and the insurer a mutual right of cancellation without limitation to conditions or contingencies, it is not necessary that the insurer in giving notice of cancellation should state the ground upon which the cancellation was based, and a statement in such a notice that the policy was canceled for nonpayment of premium, when in fact the premium had been paid, does not affect the validity of the cancellation. (Wing Chung Long Company v. Prussian National Insurance Company, 715.)

INTEREST.

- 1. CONTRACT—SERVICES IN PURCHASING LAND—FRACTION OF NET PROFITS ON RESALE—INTEREST NOT CHARGEABLE.**—An owner of land is not entitled under the terms of a letter reciting that it was his understanding and agreement that the person to whom the letter was addressed was to have one-third of the net profits arising from the

INTEREST (Continued).

operation or final sale of the property for services rendered in and about its purchase, to deduct from the net profits interest upon the amount of the investment. (Young v. Canfield, 343.)

2. **EXPRESS CONTRACT.**—The matter of the payment of interest must be made the subject of an express agreement, otherwise it cannot be charged, excepting in case of a loan of money which by section 1914 of the Civil Code is made subject to the payment of interest by presumption. (Id.)

INTOXICATING LIQUORS. See **Criminal Law**, 35; **Deed**; **Vendor and Vendee**, 2, 8-11.

JUDGE. See **Costa**.

JUDGMENT.

1. **DEFAULT JUDGMENT—RELIEF UNDER SECTION 473, CODE OF CIVIL PROCEDURE—REFUSAL TO VACATE—TARDY AND INSUFFICIENTLY SUPPORTED MOTION.**—A motion made under section 473 of the Code of Civil Procedure to set aside a judgment by default in an action for divorce upon the ground of excusable neglect, is properly denied, where the application was not made until a few days prior to the expiration of the six-month period, and only supported by the affidavit of the defendant, reciting that the reason why no appearance had been filed prior to the default, was that the defendant's attorney was away at the time and neglected to enter an appearance or procure an extension of time to do so. (Farias v. Farias, 237.)
2. **FORECLOSURE OF LIEN—PERSONAL JUDGMENT—SUPPORT BY PRAYER OR COMPLAINT.**—In an action for the foreclosure of a mechanic's lien, the fact that the body of the complaint sought no personal judgment against the defendant is not fatal to such a judgment, where the prayer of the complaint demanded a judgment of this nature. (McGuire v. Rees, 291.)
3. **JUDGMENT AGAINST ADMINISTRATOR—PAYMENT IN DUE COURSE OF ADMINISTRATION—CORRECTION ON APPEAL.**—Error in a judgment against an administrator in not directing that it be paid in due course of administration is correctible on appeal. (Brinkley-Douglas Fruit Co. v. Silman, 643.)
4. **JUDGMENT BY DEFAULT—PREMATURE ENTRY—SUBSEQUENT MOTION TO ENTER DEFAULT—PENDENCY OF MOTION TO VACATE—ENTRY OF DEFAULT PROPERLY REFUSED.**—A default entered by the clerk upon the expiration of ten days from the time of service of an amended complaint, but within less than ten days from the time of filing of such amended complaint, is irregular; and a motion made after the expiration of ten days from the time of the filing of such complaint to enter the default, is properly denied, where at the time such

JUDGMENT (Continued).

motion was made there was pending a motion to set aside the default. (City Properties Company v. Meacham, 696.)

5. INADVERTENT ENTRY OF JUDGMENT—APPEAL—POWER OF TRIAL COURT TO VACATE.—Where the clerk of the court inadvertently enters findings delivered to him for the judge, as the judgment of the court, without the judge having seen or examined them, the court has power to set aside the judgment, although an appeal had been taken therefrom. (Id.)

See Appeal, 4, 5, 11, 12; Claim and Delivery; Corporation, 8; Divorce, 2, 3; Husband and Wife, 1, 2; Insurance, 1, 2; Summons, 2, 3, 5, 6.

JURISDICTION. See Appeal, 2; Husband and Wife, 8; Summons, 1, 2.

JURY AND JURORS. See Criminal Law, 8-11, 46-50, 65, 66; Juvenile Court.

JUSTICE'S COURT.

JUSTICE'S COURT APPEAL—EXCEPTION TO SURETIES ON UNDERTAKING—SERVICE AND FILING OF NOTICE.—Notice of exception to sureties on an undertaking on appeal from a justice's court must be served upon the appellant as well as filed with the justice, and the exception is not complete until both acts are performed. (Consolidated Lumber Company v. Superior Court, 126.)

See Prohibition.

JUVENILE COURT.

1. JUVENILE ACT—COMMITMENT WITHOUT JURY TRIAL—CONSTITUTIONALITY OF ACT.—Under the Juvenile Act, no infringement of constitutional rights is worked because the accused is not given a right to trial by jury, as the orders of commitment in such cases are not for the purpose of inflicting punishment, but to provide suitable guardianship, either by individuals or under the official supervision of the superintendents of state schools. (Matter of Brodie, 751.)

2. DEPRIVATION OF CUSTODY OF MINOR—FINDINGS ESSENTIAL.—In view of the provisions of section 9b of the Juvenile Act, it is essential to sustain a valid order of commitment, where a minor is taken from the custody of a parent or guardian, that a finding be made that the welfare of the minor requires the taking away of such custody. (Id.)

LACHES. See Specific Performance, 1.

LAND. See Public Lands; School Lands,
§§ Cal. App.—54

LANDLORD AND TENANT.

1. AMOUNT PAID IN ADDITION TO RENT—BONUS—CONSTRUCTION OF LEASE.—Under a lease of property for the terms of ten years providing that the lessees "will pay to the lessor as a further consideration for this lease in addition to the rent hereinabove reserved the sum of \$7,200, receipt of which is hereby acknowledged by the lessor," and that, if the lessees should pay the rent reserved when due, and perform and observe the agreements of the lease for the first nine years, seven months, and twelve days, and the lease shall not be terminated within such period by the re-entry of the lessor, he will credit the sum of seven thousand two hundred dollars upon the remainder of the term, such sum is not to be construed as security for the payment of the rent reserved during the time ending with the eviction of the lessees for non-payment of rent and any damages sustained, but as in the nature of a bonus or additional consideration for the lease of the premises. (*Ramish v. Workman*, 19.)
2. LEASE—ACTION FOR BREACH—PROXIMATE CAUSE OF DAMAGE.—In this action to recover damages for the breach of the terms of a contract of lease, it is held that the proximate cause of the damage sustained by the plaintiff was the failure of the defendant to construct headgates, as provided by the lease, to enable the plaintiff to irrigate the land demised. (*Chambers v. Belmore Land & Water Company*, 78.)
3. PREVENTION OF DAMAGE—RULE INAPPLICABLE.—Where the failure to construct such headgates caused a failure of a large portion of the lessees' crop, they cannot be denied recovery on the ground that they should have constructed the headgates themselves, where the cost of such construction would have been upward of two thousand dollars. (*Id.*)
4. CROPPING LEASE—PAYMENT FOR LEVELING AND CHECKING LAND—INTERPRETATION OF ORAL CONTRACT—CONDUCT OF PARTIES.—Where parties standing in the relation of landlord and tenant with respect to a tract of land which the latter was to work on shares under a cropping lease place their own construction upon the terms of an oral understanding between them as to the extent to which the work of the tenant in leveling and checking the land should proceed before he was entitled to be paid for such work, it is not error for the trial court to interpret the contract in keeping with the conduct of the parties in making their settlements from time to time. (*Kloster v. Hawn*, 100.)
5. RECOVERY FOR LEVELING AND CHECKING LAND—EVIDENCE—TESTIMONY OF SURVEYOR—REBUTTAL.—Where an action in unlawful detainer to oust the tenant from the land is consolidated for trial with a subsequent action brought by the landlord for proceeds from the sale of crops, in which action the tenant by cross-complaint sought judgment for money expended in plowing and checking the

LANDLORD AND TENANT (Continued).

land upon an oral agreement, it is not prejudicial error to refuse to permit the plaintiff to testify in rebuttal as to his having ordered a surveyor to make a survey of the land for the purpose of showing the amount of work done by the defendant, or in refusing to permit the surveyor to testify as to what work his survey showed to have been done, where the record shows that the surveyor, when called as a witness by plaintiff, testified, without objection, to the extent of identifying the maps which he had made, and such maps were then admitted in evidence. (Id.)

6. AGREEMENT FOR LEASING OF STOREROOM—DAMAGES FOR BREACH.—In an action to recover damages for the breach of a contract whereby the defendant agreed to lease to the plaintiff a store-room then in process of construction, the plaintiff is not entitled to recover any damages for the loss incurred by him in selling his business at another location, as the parties, when they made the contract, did not contemplate that plaintiff in reliance upon their agreement should give his property away or sell it at a sacrifice. (Schnierow v. Boutagy, 336.)

7. DAMAGES FOR BREACH OF CONTRACT.—The damages that can be recovered for a breach of a contract are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach; other damages are too remote. (Id.)

8. ASSIGNMENT OF LEASE—CONSENT OF LANDLORD—LIABILITY OF ASSIGNORS FOR RENTS.—Written consent given to an assignment of a lease does not have the effect of releasing the lessees from their obligation to pay the rent reserved in the lease, where the assignment imposed no obligation on the assignees to pay the rent, and the consent was conditional upon the assignees complying with the terms of the lease without any release of the assignors. (Eddie v. Gage Manufacturing Company, 338.)

9. RECOVERY OF RENTS—EVIDENCE—ORAL AGREEMENT TO RELEASE LESSEE.—In an action against the lessees to recover the rents, evidence is inadmissible that the plaintiff orally agreed to release the defendants. (Id.)

10. VIOLATION OF CLAUSE OF SUBLEASE—ACCEPTANCE OF RENT—RIGHT OF ACTION NOT WAIVED.—Under the terms of a sublease of a portion of a storeroom, the acceptance by the sublessor of earned rent after knowledge of the violation by the sublessee of a clause in the sublease prohibiting the placing of goods in the aisle space reserved for the common use of tenants, is not a waiver of his right to prosecute an action in unlawful detainer, where it is shown that the plaintiff made continuous objection to the violation of the clause, and the defendant continued in its violation, and also continued in the possession of the premises during the pendency of the action. (Myers v. Herskowitz, 581.)

LANDLORD AND TENANT (Continued).

11. WAIVER OF FORFEITURE—CONTINUING COVENANT—FORFEITURE—ESTOPPEL.—In the application of the rule that where a particular act or omission entitles a landlord to declare a forfeiture, the receipt of rent accruing subsequent to the act waives the forfeiture if the lessor had knowledge of the facts, there is a distinct difference between a covenant or condition which is of a continuing nature and one not of that nature. Where the general course of dealing between parties had led one of them to believe that a strict compliance with the terms of a condition binding on him will not be required, the other party may be estopped from claiming the forfeiture. (Id.)

12. CLAUSE OF LEASE—COVENANT OR CONDITION—IMMATERIALITY.—In an action in unlawful detainer to recover the possession of a portion of a storeroom for violation of a clause in the sublease thereof prohibiting the placing of goods in the aisle space reserved for the common use of tenants, it is immaterial whether such clause constituted a covenant or condition, as the provisions of section 1161 of the Code of Civil Procedure apply equally to conditions or covenants. (Id.)

13. DAMAGES — EVIDENCE — RENTAL VALUE OF PREMISES — QUALIFIED WITNESS.—A witness is sufficiently qualified to testify as to the rental value of premises as a basis for the award of damages, who is shown to have been familiar with rental values in the neighborhood for the past three or four years. (Id.)

14. LEASE—USE OF PREMISES FOR IMMORAL PURPOSES—INTERFERENCE BY MUNICIPAL AUTHORITY—ACTION FOR RELIEF—INSUFFICIENT COMPLAINT.—In an action for the cancellation of a lease or its modification in the way of a reduction of rent, the complaint fails to state a cause of action for relief either in law or equity, where it appears therefrom that both the lessor and lessee had knowledge of the fact that the premises were to be used for the purposes of prostitution, notwithstanding it was alleged that the premises by reason of the interference of municipal authority were no longer permitted to be used for such purposes. (Carlini v. Louis Schultz Company, Inc., 669.)

15. VIOLATION OF COVENANT PROHIBITING SUBLetting—ACCEPTANCE OF RENT FROM OCCUPANT—GUARANTOR OF ORIGINAL LESSEE NOT RELEASED.—Under the terms of a lease containing a covenant prohibiting the subletting of the demised premises without the written consent of the lessor, the guarantor of the lessee is not released from his contractual obligation, by the mere fact that a transfer of the business conducted on the demised premises was made, and that the lessor's agent accepted the rental from the transferee and gave him receipts therefor in his own name, or by the fact that the lessor's agent informed the occupant that he might move out if he desired, in the absence of a surrender of the premises and an acceptance thereof. (Voss v. Levi, 671.)

LANDLORD AND TENANT (Continued).

16. **REMOVAL OF GLASS AND MARBLE FRONT OF BUILDING—RIGHT OF TENANT.**—In this action by a landlord against a tenant for damages in removing a plate glass and marble stone front from the demised premises, it is held that the evidence justifies the findings that the glass and marble were attached to the building at the defendant's own expense and were his property; that they were not so affixed as to constitute them integral parts of the premises; that they were removed without damage to the freehold or building; and that the building upon such removal was put in as good condition as it was at the time that the glass and marble were installed. (Alden v. Mayfield, 684.)

17. **PLEADING — AMENDMENT OF ANSWER — DISCRETION.**—In such an action where it was evident that from the very inception of the action, and particularly from the time of the filing of the answer, that it was the theory of the defendant that having put in the glass and marble front at his own expense, they constituted his property, and that he had the right to remove them on the termination of his lease, but such theory was not presented by the answer as originally filed, and that by reason thereof the defendant lost on appeal, it is an exercise of sound judicial discretion to grant the defendant on the second trial leave to amend his answer conformably to such theory. (Id.)

18. **RECOVERY OF TREBLE RENTS—WILLFUL WITHHOLDING—SUFFICIENCY OF EVIDENCE.**—In an action by a landlord to recover possession of demised property, rents due up to the time of the termination of the tenancy and for treble rent for the period subsequent to that date, a willful holding over is established under section 3345 of the Civil Code by evidence of deliberate, intentional, obstinate refusal to surrender possession with knowledge that the tenancy had been terminated, and that the tenant was holding over against the will and consent of the landlord, and not under a reasonable claim of right. (Alden v. Mayfield, 724.)

19. **WILLFUL HOLDING OVER—OMITTED ALLEGATION—CURE BY ANSWER.** While in an action to recover treble rents for holding over after demand and one month's notice in writing, the complaint should contain an allegation that the holding over was willful, the omission of such an allegation is cured by the allegation in the answer that the defendants from the date of the termination of the tenancy retained possession of the premises in good faith and under claim of right. (Id.)

20. **TERMINATION OF LEASE—SUFFICIENCY OF TENDER.**—A lease giving the lessor the right to terminate it on the first day of December of any year during the term by paying to the lessee such amount as might be due him for certain reclaiming and leveeing work which the lease provided he was to do, and for which he was to be paid a stipulated sum per acre, is terminated by leaving a properly indorsed certificate of deposit for the amount in

LANDLORD AND TENANT (Continued).

question with a bank of excellent standing convenient to the lessee's place of business, with a written request to notify the lessee that the certificate was there subject to his order, notwithstanding the bank misunderstood the instructions and notified the lessee that the certificate had been left with it to be held pending settlement between the parties in regard to some levee work, where the lessee thereafter learned that the certificate was being held subject to his order, and made no objection at that time, or at any other time, to the time or mode of the tender. (Smith v. Lobb, 790.)

21. **TENDER OF CHECK—PAYMENT OF MONEY OBLIGATION.**—The tender of a check or of a certificate of deposit in payment of a money obligation is good unless objected to. (Id.)

See Guaranty.

LEASE. See Landlord and Tenant.

LEGISLATURE. See Office and Officers, 1-4.

LEWDNESS. See Criminal Law, 32.

LIBEL. See Criminal Law, 33, 34.

LICENSE. See Municipal Corporations, 1, 3.

LIEN. See Mechanic's Lien; Mortgage.

LOAN. See Statute of Limitations.

LOS ANGELES, COUNTY OF. See Office and Officers, 5-7.

MANDAMUS. See Office and Officers; Sheriff.

MASTER AND SERVANT. See Employer and Employee.

MEASURE OF DAMAGES. See Damages.

MECHANIC'S LIEN.

1. **FORECLOSURE — ENGINEER'S CERTIFICATE — PLEADING — OMISSION TO ALLEGE — LACK OF PREJUDICE.**—In an action by original contractors to enforce a mechanic's lien for an unpaid balance alleged to be due them upon a contract for the construction of a concrete reservoir, the defendant is not prejudiced by an error in overruling his demurrer to the complaint for uncertainty, in that it failed to make any reference to the engineer's certificate of completion of the reservoir required by the contract as a prerequisite condition to plaintiffs' right to final payment, or to allege any excuse for not producing the same, where it appears from the evidence received without objection that such certificate was refused upon the

MECHANIC'S LIEN (Continued).

ground that plaintiffs had not, as alleged by them, completed the reservoir in accordance with the terms of the contract and performed all the conditions thereof. (*Simmons v. Firth*, 187.)

2. **COMPLETION OF WORK—TRIVIAL OMISSIONS.**—In the construction of a concrete reservoir at an agreed price of \$5,995, the omission of five items called for by the specifications of the aggregate cost of \$62.85, is trivial, and cannot be deemed to constitute such a lack of completion as to prevent the filing of liens. (*Id.*)

3. **DEFECTS IN CONSTRUCTION—FAULTY SPECIFICATIONS—CONTRACTORS NOT RESPONSIBLE.**—In the construction of a concrete reservoir the contractors are not to be held responsible for leakages in the reservoir or for defects in the construction of the roof thereon, where the walls and roof of the reservoir were constructed in strict accordance with the plans and specifications furnished by the owner's engineer. (*Id.*)

4. **DELAY IN COMPLETION—FAILURE OF OWNER TO SUPPLY WATER—ESTOPPEL.**—In such an action the owner is estopped from contending that the plaintiffs failed to complete the reservoir within the contract time, where such failure was due to the failure of the owner to furnish plaintiffs with a necessary supply of water, as provided by the contract. (*Id.*)

5. **CONTRACT FOR CONSTRUCTION OF RESERVOIR—SUPPLY OF WATER BY OWNER—PLACE OF—SILENCE OF CONTRACT—PAROL EVIDENCE ADMISSIBLE.**—Where specifications for the construction of a reservoir provide that the owner shall supply the contractors with water for mixing purposes, but are silent as to the place at which the owner is to deliver the water, parol evidence is admissible to show that it was agreed that the water was to be delivered through a pipeline then in course of construction, at or near the proposed reservoir site. (*Id.*)

6. **NOTICE TO WITHHOLD—SCHOOL PROPERTY—RIGHT OF TRUSTEES.**—Under section 1184 of the Code of Civil Procedure, as amended in 1911, providing that upon the giving of a notice to withhold, the owner of property not subject to mechanics' liens shall withhold from the contractor sufficient money to cover the claim embraced in the notice, a school district is justified in refusing to issue its warrant for the balance due the contractor on the construction of a school building, where prior to the demand for the issuance of the warrant, the district was served with withhold notices by laborers and materialmen who performed labor and furnished material for the building. (*Sweeney v. Board of Trustees of Auburn School District*, 331.)

7. **RESORT TO BOND—REMEDY NOT EXCLUSIVE.**—The remedy given laborers and materialmen to resort to the bond given under section 1183 of the Code of Civil Procedure is not exclusive. (*Id.*)

MECHANIC'S LIEN (Continued).

8. **IMPROVEMENT NOT EXCEEDING ONE THOUSAND DOLLARS—LAW PRIOR TO CODE AMENDMENTS OF 1911.**—At all times prior to the amendments of sections 1183 and 1184 of the Code of Civil Procedure, which became effective on June 30, 1911, the law permitted an owner of real property, in causing the construction of any improvement thereon at a cost of not more than one thousand dollars, to provide for such improvement by a contract not filed in the recorder's office, or even by an oral contract, and to pay the consideration therefor whenever it pleased him to do so; and the provisions of such code with reference to putting in writing building contracts, and filing them for record, and as to the mode and time of payment and the withholding of a percentage of the contract price, were not applicable to such an improvement. (*Bailey Ornamental Iron Company v. Goldschmidt*, 661.)
9. **ORAL CONTRACT UNDER ONE THOUSAND DOLLARS—EXECUTION PRIOR TO CODE AMENDMENTS—PERFORMANCE SUBSEQUENT—AMENDMENTS INAPPLICABLE.**—The amendments of 1913 to sections 1183 and 1184 of the Code of Civil Procedure are not applicable to an oral contract for the construction of a balcony on a dwelling entered into prior to the date that such amendments became effective, where the amount of the contract price was less than one thousand dollars, although the work was not commenced until after such amendments became effective. (*Id.*)
10. **RIGHT OF LIEN—STATUTORY ENACTMENT ESSENTIAL.**—The declaration of article XX, section 15, of the constitution that mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished, and that the legislature should provide, by law, for the speedy and efficient enforcement of such liens, is inoperative except as supplemented by legislative action, and until the enactment of the necessary statute the lien contemplated by the constitution does not exist. (*Id.*)

See Judgment, 2.

MINES AND MINING.

MINING LAW—PATENT UNDER ACT OF 1866—RIGHT TO FOLLOW VEIN.—Under the Federal Mining Act of July 26, 1866, a patent to a lode claim grants the fee of the land including so much of the lode as apexes within the exterior surface boundaries of the land, with the right to follow the vein on its dip, and nothing more. (*Whildin v. Maryland Gold Quartz Mining Co.*, 270.)

MINORS. See Juvenile Court.

MORTGAGE.

1. **FORECLOSURE—CONSIDERATION—CANCELLATION OF PREVIOUS NOTE—SURRENDER OF PLEDGED STOCK.**—In an action for the foreclosure of a mortgage given to secure the payment of a promissory note, a finding against the defendant on the issue of want of consideration for the execution of the note and mortgage is supported by evidence of the return to the defendant by the plaintiff of a previous note upon its maturity without payment, together with certain corporate stock pledged as security for its payment. (*Gabbs v. Countryman*, 385.)
2. **FORECLOSURE OF MORTGAGE—CONCEALMENT OF OWNERSHIP OF PRIOR MORTGAGE—RETENTION OF POSSESSION.**—In an action to foreclose a second mortgage, which was given in connection with a first mortgage, for the unpaid purchase price of the mortgaged property, the mortgagors cannot contend that the plaintiff should be denied equitable relief on the ground that they were deceived as to the ownership of the first mortgage, where they remained in possession of the property, were not damaged by the concealment, and made no attempt at rescission of the transaction, or offer to return the property. (*Davies v. Patton*, 713.)

See *Cancellation*, 1.

MOTOR VEHICLES. See *Municipal Corporations*, 2.**MUNICIPAL CORPORATIONS.**

1. **MUNICIPAL ORDINANCE—DELIVERIES FOR LAUNDRIES SITUATED OUTSIDE OF CITY LIMITS—LICENSE—DISCRIMINATORY REGULATION.**—A city ordinance requiring the payment of \$12 per annum from every person, firm, or corporation conducting, managing, or carrying on a laundry, and the payment of \$120 per annum by every person, firm, or corporation owning, operating, or maintaining a wagon or other vehicle for the delivery of laundry work to and from any laundry situated outside of the city limits, is discriminatory and void as an attempt to create and enforce a discrimination not based upon differences in the nature of the business being transacted, or differences in the manner of conducting the same business, or any other difference other than the mere fact of difference in destination of the goods collected and delivered by wagons collecting for laundries located outside of the city and the destination of goods collected for delivery to laundries within the city. (*Matter of Hines*, 45.)
2. **CITY OF OAKLAND—ABOLITION OF CLERKSHPIS AND OFFICES—POWER OF COUNCIL—CONSTRUCTION OF CHARTER.**—The general power vested in the council of the city of Oakland by section 31 of its charter (Stats. 1911, pt. 11, p. 1551) to create and abolish clerkships and offices is not abridged in so far as those persons are

MUNICIPAL CORPORATIONS (Continued).

concerned who were in the employment of the municipality on September 1, 1910, by the provision of section 80, declaring that persons employed by the city on that date may retain their employment, subject to classification and reclassification by the civil service board, without further examination, unless removed for cause, or unless it shall be determined by the civil service board that their employment by the city is unnecessary. (Foley v. City of Oakland, 128.)

3. MUNICIPAL ORDINANCE—LICENSING OF MOTOR VEHICLES—USING STREETS FOR CARRIAGE OF PASSENGERS BETWEEN OUTSIDE POINTS.—A provision of an ordinance of a city of the sixth class making it unlawful, without first obtaining a license so to do, for any person to operate or carry on the business of operating any auto bus or motor vehicle over the streets of the city in carrying passengers for hire from one point to another, both of which points are outside the city boundaries, is invalid, as being in excess of the authority given to cities of the sixth class by subdivision 10 of section 862 of the charter for cities of the sixth class to license for the purpose of revenue and regulation every kind of business transacted and carried on in the city. (Matter of Smith, 161.)
4. STREET IMPROVEMENT IN CITY OF PETALUMA—NECESSITY OF ORDINANCE.—In the doing of street work in the city of Petaluma under the provisions of the act of the legislature approved March 6, 1889, it is not necessary that the city, prior to the entering upon the work, should adopt an ordinance electing to proceed under the state law and adopting its procedure as the one to be followed in making the improvement, as section 21 of article III of the charter of the city requiring that such work should be done by ordinance not in conflict with state laws, must be read in connection with section 68 of such article, which provides that in the absence of any procedure for carrying out or effectuating any granted or implied power or authority, the general law of the state shall prevail, and be followed. (Matter of the Difference and Controversy Between Thomas and the City of Petaluma, 547.)

See County; Drainage District, 2, 3.

MURDER AND MANSLAUGHTER. See Criminal Law, 87-57.

NEGLIGENCE.

1. BREAKING OF DEFECTIVE ROPE—INJURY TO EMPLOYEE OF BRIDGE COMPANY—ERRONEOUS NONSUIT.—In an action to recover damages for injuries sustained by an employee of a bridge construction company from the breaking of a rope while pulling away a board mold from around hardened concrete, it is error to grant a motion for nonsuit at the close of the case, where the evidence tends to show that the rope was known to the defendants to be worn and weak.

NEGLIGENCE (Continued).

ened to an extent that rendered it unfit for the purpose. (Gideon v. Howard, 5.)

2. **COLLISION OF AUTOMOBILES—INJURY TO MINOR—APPEAL—RECORD—PRESUMPTION.**—In an action for damages for personal injuries sustained by a child as a result of being struck by an automobile, which was diverted from the roadway and precipitated against her by reason of colliding with another automobile operated by the defendant, it will be assumed on appeal that the jury was justified in finding that the injury was due solely and alone to defendant's negligence in operating his car, where the evidence touching the action of the parties in the operation of their cars was conflicting, and the plat of the location and position of the cars used by the witnesses in testifying not brought up on the appeal. (Dilger v. Whittier, 15.)

3. **EVIDENCE—SPEED OF CAR.**—In such an action an objection that a witness who was allowed to testify as to the speed of defendant's car had not seen the car in sufficient time prior to the accident to testify on the subject goes to the weight, rather than to the competency, of the evidence, and its admission is not error where it differed but little from the evidence offered by the defendant on the subject. (Id.)

4. **PERSONAL INJURIES—CONFLICT OF EVIDENCE—APPEAL—VERDICT CONCLUSIVE.**—In an action to recover damages for personal injuries, where the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff is in conflict, the appellate court is bound by the determination of the jury. (Potter v. Back Country Transportation Company, 24.)

5. **INSTRUCTION—FAILURE TO GIVE—APPEAL.**—An appellant may not on appeal for the first time take advantage of the trial court's failure to give some specific instruction, if he presented no such instruction to that court. (Id.)

6. **DOCTRINE OF LAST CLEAR CHANCE—RIGHT TO INVOKE.**—The doctrine of "last clear chance" can be invoked only in favor of the person who is injured. (Id.)

7. **INJURY TO MOTORMAN OF INTERURBAN TRAIN—RUNNING INTO OPEN SWITCH—LACK OF CONTRIBUTORY NEGLIGENCE.**—In this action by a motorman of an interurban electric train to recover damages for personal injuries sustained from the running of his train into an open switch causing collision with a local car, it is held that the evidence is sufficient to support the implied findings of the jury that the plaintiff was not negligent in driving his train into the switch in disregard of switch lamp signals, or in approaching the switch point with the train not under control and prepared to stop, as required by the defendant's rules. (Lincoln v. Pacific Electric Ry. Co., 83.)

NEGLIGENCE (Continued).

8. COMPARATIVE NEGLIGENCE—EFFECT OF STATUTE.—Where at the time of the occurrence of such accident there was a statute in force providing that an employee's contributory negligence should not be a bar to recovery for personal injuries where his negligence was slight, and that of the employer was gross, in comparison, but the damages might be diminished in proportion to such contributory negligence (Stats. 1911, p. 796), the plaintiff, even if found to be negligent, is not precluded from recovery if the jury believed his negligence was slight in comparison with that of his employer; and where such an instruction is given, it will be presumed that the jury properly assessed damages, making due allowance in accordance with the facts found and as required by the statute. (*Id.*)
9. MASTER AND SERVANT—SAFE PLACE TO WORK—CHOICE OF DANGEROUS WAY—CONTRIBUTORY NEGLIGENCE.—The duty of an employer to furnish an employee with a reasonably safe place to work is fulfilled when he exercises ordinary care for that purpose, and when a safe way has been provided, and another and dangerous way exists, if the employee chooses to take the dangerous way and is injured, he is guilty of contributory negligence as a matter of law. (*Matchette v. California Fruit Canners Assn.*, 156.)
10. DEATH OF RAILROAD BRAKEMAN—SELECTION OF PLACE OF OBVIOUS DANGER—CONTRIBUTORY NEGLIGENCE.—In an action for the death of a brakeman killed while switching cars in the yards of a canning company, the deceased is properly held guilty of contributory negligence, as a matter of law, where it is shown that he was an experienced brakeman, and that he, in the performance of his duty, had free choice of several positions, and selected one of obvious danger. (*Id.*)
11. INJURY TO PAINTER—FALL OF SCAFFOLD—SUFFICIENCY OF EVIDENCE.—In an action for damages for personal injuries sustained by a painter from the fall of the scaffold upon which he was working, evidence that it was possible for the employers of the plaintiff to have secured the scaffold against slipping of the shingles to which it was attached by fastening a rope to the hooks and tying it to a chimney on the top of the building, is sufficient to sustain the finding that the defendants were negligent in not providing plaintiff a safe place to work. (*West v. Linney*, 164.)
12. DOCTRINE OF RES IPSA LOQUITUR.—Where a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. (*Lippert v. Pacific Sugar Corp.*, 198.)
13. DEATH OF ENGINEER OF SUGAR-BEET PLANT—EXPLOSION OF PRE-HEATER—APPLICABILITY OF DOCTRINE.—The doctrine of *res ipsa*

NEGLIGENCE (Continued).

loquitur is applicable to an action for damages for the death of a master mechanic having the oversight of the machinery of a beet-sugar plant, from the explosion of a "pre-heater" operated by a boy of the age of sixteen years, where it is shown that it was not the duty of the deceased to personally operate the boiler, and he was informed that the heater would safely carry a steam pressure of seventy pounds, when, in fact, it was only built for a maximum pressure of forty pounds. (Id.)

14. PLEADING—SPECIFIC ACTS OF NEGLIGENCE—RIGHT TO RELY UPON DOCTRINE—LACK OF WAIVER.—In such an action the plaintiffs are not precluded from relying upon the doctrine of *res ipsa loquitur* because they charged specific omissions of duties or acts of negligence. (Id.)

15. RISKS OF EXPLOSION NOT ASSUMED.—A master mechanic intrusted with the oversight of all the machinery of a sugar plant does not assume the risk of the explosion of a pre-heater used in connection with the plant, where there is no evidence that the same was out of repair, or that there is any imperfection in it calling for repair, or that it is not in thorough running condition, and the same was operated by an employee under the directions of the superintendent of the plant, and not of the deceased, and upon the representation that it would withstand a steam pressure of nearly double its actual maximum resisting capacity. (Id.)

16. FALL THROUGH OPEN TRAPDOOR IN SALOON—LIABILITY OF OWNERS TO INJURED PARTY.—Where a person entered a saloon for the purpose of using the toilet, and after doing so returned to the barroom and ordered a drink, and after being served walked across the room to examine a picture hanging on the wall, and in doing so fell into an open trapdoor and was injured, the relation of the injured party to the saloon owners at the time of the injury was that of a customer to whom the latter owed the duty of ordinary care, and such duty was violated by leaving such trapdoor open and unguarded in that portion of the floor space which was open and accessible to customers. (Braun v. Vallade, 279.)

17. DUTY TO GUARD TRAPDOOR—CONFUSING INSTRUCTION—CURE BY OTHER INSTRUCTION.—An instruction that if the defendants in the conduct of their business negligently opened and left open and not properly guarded or obstructed a trapdoor in the floor of the saloon, and that such trapdoor was then a part of such barroom and open to the use of patrons, customers, and the public, and plaintiff was lawfully on the premises, and such negligence and not plaintiff's negligence was the proximate cause of the injuries, the jury should find for the plaintiff, while confusing as to whether reference was made to the floor space filled by the trapdoor when closed or to the spaces below the trapdoor when open, such con-

NEGLIGENCE (Continued).

fusion is cured by the instruction that if a part of the premises where the trapdoor was located was private and not open to the public, and the public did not have access thereto, the defendants were not required to maintain guards around the trapdoor. (Id.)

18. ACTION FOR DEATH—SUBSTITUTION OF PARTY PLAINTIFF—PLEADING—CAUSE OF ACTION NOT CHANGED.—An action to recover damages for the death of a servant brought by the widow of the deceased in her own name under the mistaken supposition that the case fell within the provisions of section 377 of the Code of Civil Procedure, which provides for the maintenance of such an action by the heirs or personal representatives of the deceased, is not changed by the filing of an amended complaint after the statute of limitations had run against the cause of action, where the only change in the complaint was the substitution of the widow, as administratrix, as plaintiff, in the place and stead of herself as heir at law, so as to bring the case within the provisions of section 1970 of the Civil Code. (Cox v. San Joaquin Light & Power Co., 522.)

19. CONSTRUCTION OF CODE PROVISIONS—ACTIONS FOR DEATH OF DECEASED EMPLOYEES.—Section 1970 of the Civil Code, as amended in 1907, providing that in case of the negligent death of an employee, his personal representatives shall have a right of action therefor against the employer, and may recover damages in respect thereof for and on behalf of the widow, children and other dependent relatives, has not abrogated section 377 of the Code of Civil Procedure which provides that when the death of a person, not being a minor, is caused by the wrongful act of another, his heirs or personal representatives may maintain an action for damages, in so far as concerns actions by the representatives of deceased employees. (Id.)

20. RAILROAD CORPORATION—DUTY OF COMPANY AND PASSENGERS—DEGREE OF CARE REQUIRED.—A railroad company is required to exercise an extraordinary and unusual degree of care as to its passengers while in transit, but as to passengers not actually in transit but on the railroad premises or property, the railroad is relieved of the extraordinary degree of care required of it toward passengers in transit, and the passengers are relieved of the extraordinary degree of care required of persons not bearing such relation to the railroad company and the measure of duty in such case of the railroad company toward the passenger, and of the passenger toward the railroad company, is that each should exercise ordinary care. (Sellars v. Southern Pacific Co., 701.)

21. INJURY TO RAILROAD PASSENGER—FALL IN ATTEMPTING TO REBOARD TRAIN AT EATING-STATION—LACK OF ORDINARY CARE—QUESTION FOR JURY.—In an action for injuries received by a passenger on a railroad train while in the act of going upon the platform of her car after having left the same for the purpose of procuring a meal at one of the company's eating-stations, the question whether the de-

NEGLIGENCE (Continued).

defendant failed to exercise ordinary care in not providing a porter to assist persons in leaving and returning to the car, and in not providing a stool or other contrivance to break the distance from the steps of the car to the ground, was properly submitted to the jury. (Id.)

22. ARGUMENTATIVE INSTRUCTION.—An instruction that a railroad company cannot be expected to treat its passengers as children, or to put them under restraint, is properly refused, as it is misleading, obscure, and commonplace. (Id.)

23. CARBOLIC ACID GIVEN FOR WHISKY—SUFFICIENCY OF EVIDENCE.—In an action for damages for death caused by the defendant in giving the deceased a drink from a bottle containing carbolic acid under the belief that it contained whisky, the gross negligence of the defendant is established by his conduct in keeping carbolic acid in a whisky bottle without any distinguishing mark or label showing its dangerous and deadly quality, of intermingling such bottle with such a content with other similar bottles containing whisky or other drinkables, and in tendering such bottle to the deceased accompanied with the statement that he guessed it contained whisky. (Pell v. Herbert, 730.)

24. CONDUCT OF DECEASED—LACK OF CONTRIBUTORY NEGLIGENCE.—The act of the deceased in accepting the defendant's proffered drink, and of assuming without question or investigation that the bottle from which he drank contained liquor similar to that which he had just seen the defendant drink, and in believing it to be the whisky which he had just been invited to partake of, did not constitute contributory negligence, in view of the fact that the liquid which he drank was not poured out in a glass, or other open receptacle, where its color or smell or other dissimilarity to whisky might reasonably attract his notice and arouse his suspicion. (Id.)

25. VERDICT NOT EXCESSIVE.—A verdict of two thousand dollars for the death of a human being in such an action is not so excessive as to justify the conclusion that the jury were moved by undue passion or prejudice in its rendition or amount. (Id.)

See Common Carrier.

NEGOTIABLE INSTRUMENT. See Promissory Note.

NEW TRIAL.

1. NEWLY DISCOVERED EVIDENCE.—A new trial will not be granted on the ground of newly discovered evidence which was almost wholly cumulative, and particularly where it appeared that by the exercise of reasonable diligence the unsuccessful party could have procured such evidence at the trial. (Chambers v. Belmore L. & W. Co., 78.)

NEW TRIAL (Continued).

2. NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE—QUESTION FOR TRIAL COURT—APPEAL.—On a motion for a new trial upon the ground of newly discovered evidence, where the evidence proffered upon the motion is cumulative of evidence offered upon the same general subject during the trial, the determination of the question as to whether a new trial should be granted or refused upon that ground is peculiarly within the province of the trial court, and a clear abuse of discretion must be shown before the order of the trial court will be disturbed on appeal. (*Fiori v. Agnew*, 284.)

See Criminal Law, 1, 3; Prohibition.

NOVATION.

PAROL EVIDENCE.—A novation in a written contract may be proven by parol without violating the rule as to the inadmissibility of oral evidence to vary the terms of a written instrument. (*Robinson v. Rispin*, 536.)

OAKLAND, CITY OF. See Municipal Corporations, 2.

OFFICE AND OFFICERS.

1. CONSTITUTIONAL LAW—HOLDING OF CIVIL OFFICE BY MEMBER OF LEGISLATURE—APPLICABILITY OF AMENDMENT.—The amendment of section 19 of article IV of the constitution, which went into effect December 21, 1916, providing that no senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under the state, is not confined in its application to senators and assemblymen to be elected after such date, but is applicable to members of the legislature whose terms began before that date and had not expired at the time the amendment went into effect. (*Chenoweth v. Chambers*, 104.)

2. "TERM" DEFINED.—The word "term" used in the section refers to the period for which the member was elected and not merely to his incumbency. (Id.)

3. "SHALL" DEFINED.—The word "shall" in such section is used as a word of command, in accordance with the constitution, that its provisions "are mandatory and prohibitory, unless by express words they are declared to be otherwise," and neither legally nor grammatically does it denote mere futurity. (Id.)

4. STATUTORY CONSTRUCTION—UNAMBIGUOUS WORDS.—Where the words of a statute are not ambiguous and their effect is not absurd, the court will not give it other than its plain meaning, although it may appear probable that a different object was in the mind of the legislature. (Id.)

5. COUNTY OF LOS ANGELES—REGISTRAR OF VOTERS—UNAUTHORIZED TRANSFER OF DEPUTY COUNTY CLERK—FAILURE OF CIVIL SERVICE

OFFICE AND OFFICERS (Continued).

COMMISSION TO PRESCRIBE RULES.—Under the charter of the county of Los Angeles, which went into effect on June 2, 1913, the civil service commission of the city of Los Angeles is without jurisdiction to transfer a deputy county clerk to the office of registrar of voters, where the commission had not, as required by section 34, article IX, of such charter, prescribed rules under which it might make transfers from one position to a similar position in the same class or grade, and there existed no other provision in the charter empowering the board to make the transfer. (People ex rel. Lyons v. McAleer, 135.)

- 6. OFFICE OF REGISTRAR OF VOTERS — MANNER OF APPOINTMENT.**—Under the provisions of section 14 of article IV of the charter of the county of Los Angeles, the registrar of voters of such county is an appointive officer, and the office not being in the unclassified civil service named in article IX, section 33, appointment to the office must, as required by subdivision 1, section 11, of article III, be made by the board of supervisors from the eligible civil service list, consisting of three persons certified by the commission as standing highest in accordance with the general rule prescribed by the commission for the creation of such list. (Id.)
- 7. CHARACTER OF OFFICE—CHARTER.**—The office of registrar of voters of the county of Los Angeles is, under the charter of that county, an independent office, as distinct and separate from that of county clerk as is that of auditor or recorder, and since it is specified as one of the offices to be filled by appointment to be made by the board of supervisors from the eligible civil service list, it cannot, under the pretense that it was of a like grade and class with that of deputy county clerk, be filled by the act of the civil service commission under the guise of transferring a deputy county clerk in charge of the registration department to such independent and distinct office. (Id.)
- 8. PUBLIC OFFICE — PERFORMANCE OF DUTY BY DE FACTO OFFICER—MANDAMUS BY TAXPAYER.**—A writ of mandate will not issue at the instance of a city taxpayer to compel an alleged *de jure* city assessor to perform the duties of such office, where the same are being performed by a county assessor under claim and color of right with the acquiescence of the city council and the city assessor *de jure*, as the question of the right to the office is one for litigation in a direct proceeding between the parties directly interested. (Hamilton v. Mallard, 470.)

See County, 3, 4; District Attorney; Municipal Corporations, 2; Sheriff.

OPTION. See Vendor and Vendee, 1.

ORDINANCE. See Municipal Corporations.

PARENT AND CHILD.

1. SUPPORT OF ILLEGITIMATE CHILD—ACTION BY MOTHER—SUPPORT PENDING APPEAL.—In an action brought by a mother of an illegitimate child to compel its alleged father to pay a monthly sum reasonably necessary for the support, maintenance, and education of the child, the trial court has no inherent power, as in actions for divorce where the marriage is admitted, to compel the father to pay to the mother the costs necessary to resist an appeal taken by the father, or to compel the father to support the child pending the appeal, as no such obligation arises until the paternity of the alleged illegitimate child is established. (*Schallman v. Haas*, 28.)
2. CONSTRUCTION OF CODE PROVISIONS.—Section 196a of the Civil Code, requiring the father of an illegitimate minor child to give it support and education suitable to his circumstances, and authorizing a civil suit in behalf of the child by the mother to enforce such obligations, and giving the court power to enforce performance of such obligations the same as under sections 138, 139, and 140 of the Civil Code, in a suit for divorce by a wife, does not, by making the latter named sections a part of section 196a, impose the obligations provided by such sections upon the defendant in an action to compel the support of an illegitimate child, but the sole purpose of such incorporation was to provide a full and complete remedy for the enforcement of the obligations when established. (*Id.*)

See *Divorce; Criminal Law*, 58-62.

PARTIES. See *Elections*, 3; *Husband and Wife*, 1.

PAYMENT. See *Corporation*, 5, 6; *Insurance*, 2; *Promissory Note*, 1; *Sale*, 11.

PETALUMA, CITY OF. See *Municipal Corporations*, 4.

PLACE OF TRIAL.

1. CONTRACT—REMOVAL TO CORPORATION'S PRINCIPAL PLACE OF BUSINESS.—A defendant corporation is entitled to have removed to the county of its principal place of business for trial, an action on a contract made in that county and to be performed there. (*L. & E. Emanuel, Inc., v. Oberlin Bros. Co.*, 235.)
2. ACTIONS BETWEEN COUNTIES—CONSTITUTIONALITY OF CODE PROVISION.—Section 394 of the Code of Civil Procedure, as amended in 1915, relative to the place of trial of actions between counties, cities, and cities and counties, is not unconstitutional, as class legislation, since it does not appear from the statute that an arbitrary selection has been made from among a large number of persons between whom and the persons favored (cities, counties, cities and counties) there is no reasonable distinction or substantial difference.

PLACE OF TRIAL (Continued).

justifying the inclusion of the one and exclusion of the other from such privilege. (*Mono Power Company v. City of Los Angeles*, 675.)

8. MOTION FOR CHANGE OF VENUE—AFFIDAVIT OF MERITS AND WRITTEN DEMAND NOT REQUIRED.—A motion for change of place of trial under section 394 of the Code of Civil Procedure need not be made at the time when the defendant answers or demurs, nor need it be accompanied by an affidavit of merits and a written demand for change of place of trial, as required by section 396 of such code. (*Id.*)

See *Criminal Law*, 7.

PLEADING. See *Claim and Delivery*, 2; *Contract*, 4; *Corporation*, 8, 4, 12; *Damages*, 1; *Guaranty*; *Husband and Wife*, 6; *Injunction*, 2; *Judgment*, 2; *Landlord and Tenant*, 14, 17, 19; *Mechanic's Lien*, 1; *Negligence*, 14; *Parties*; *Sale*, 9.

PLEDGE.

1. CONSIGNMENT OF GOODS TO FACTOR—TRANSFER TO PURCHASERS—APPARENT OWNERSHIP OF PROPERTY.—Under section 2991 of the Civil Code, which provides that one who has allowed another to assume the apparent ownership of property for the purpose of making a transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value, a factor to whom is consigned a carload of eggs, receives the property for the purpose of making a transfer, notwithstanding that customers have been obtained therefor prior to the consignment. (*Fairmont Creamery Company v. Los Angeles Ice & Cold Storage Company*, 414.)

2. PLEDGE OF CONSIGNMENT—EXAMINATION OF BILL OF LADING BY PLEDGEE—UNNECESSARY REQUIREMENT.—Where such a consignment is pledged by the factor as security for the repayment of a loan of money, it is not necessary in order to entitle the pledgee to hold the goods as against the real owner, that the pledgee should have examined the bill of lading. (*Id.*)

3. CONDITIONAL SALE—RIGHTS OF PLEDGEE.—Where the pledgee of an automobile purchased under a conditional contract of sale assumes the obligations of the purchaser under the contract and his assumption is recognized by the seller, he is entitled to all the rights and is subject to all the liabilities of the contract, and a wrongful taking of the possession of the machine by the purchaser, and assignment of his interest in the contract to a person who had sufficient notice to put him upon inquiry as to the wrongful taking, is illegal, as against the pledgee. (*Manor v. Dunfield*, 557.)

POLICE POWER.

- 1. REDLIGHT ABATEMENT LAW—FORFEITURES AND PROCEDURE—ACT CONSTITUTIONAL.**—The “Redlight Abatement Law” of 1913 (Stats. 1913, pp. 20-22), which in its general object is no different from that of sections 315 and 316 of the Penal Code, and which differs in a general sense from those sections only in that its design was to establish a summary method, through the civil processes of the law, for putting a stop to the maintenance of houses of ill fame and other places where acts of lewdness and prostitution are habitually practiced and carried on as a business, is a valid exercise of the police power, and the provisions contained in such act as to forfeitures and procedure do not violate any of the constitutional guarantees of property owners. (People ex rel. Bradford v. Barbiere, 770.)
- 2. NATURE OF ACTION UNDER STATUTE—USE OF BUILDING FOR IMMORAL PURPOSES—LACK OF KNOWLEDGE OF PROPERTY OWNER.**—The action authorized by the statute is *in rem*, or against the property used in the maintenance of the nuisance, as well as *in personam*, or against the person maintaining it, and while, therefore, the owner, having no actual knowledge of the business carried on in his building, might not personally be bound for the costs, the building and furniture may nevertheless be proceeded against and subjected to the forfeitures prescribed by the statute. (Id.)
- 3. DISOBEDIENCE OF ORDER OF ABATEMENT—CONTEMPT—PUNISHMENT.**—The provision of the statute authorizing the punishment as for contempt of any person guilty of disobedience to the order of abatement or the permanent injunction is not void, because, in point of severity, it conflicts with section 1218 of the Code of Civil Procedure, which fixes a penalty for contempts generally. (Id.)

POSSESSION. See **Forcible Entry and Detainer**; **Fraudulent Conveyances**; **Public Lands**.

PRACTICE. See **Appeal**; **Deposition**; **Execution**; **Findings**; **Instruction**; **Judgment**; **New Trial**; **Parties**; **Place of Trial**; **Prohibition**; **Summons**.

PRINCIPAL AND AGENT. See **Agency**.

PROHIBITION.

HEARING OF MOTION FOR NEW TRIAL—MOTION ALREADY HEARD—DISMISSAL OF APPLICATION.—While the superior court is without jurisdiction to entertain a motion for a new trial of a case on appeal from a justice's court where the trial was had upon a stipulation of the facts involved, yet where the court has heard and granted the motion after the granting of an alternative writ

PROHIBITION (Continued).

of prohibition (there being no order in force requiring the court to desist from further proceedings), the writ will not be made peremptory, as no purpose could be served thereby. (*Kaye v. Superior Court*, 269.)

See *Elections*, 3.

PROMISSORY NOTE.

1. **ACTION ON PROMISSORY NOTE—DEFENSE OF PAYMENT—AMENDMENT OF ANSWER AT TRIAL—DISCRETION.**—Where in an action on a promissory note the answer failed to deny that the note was unpaid, it will be presumed that the court properly exercised its discretion in refusing the defendant leave at the close of the plaintiff's case to amend the answer by alleging payment, in the absence of any showing of facts excusing the failure to allege the same in the first instance, or of any affidavit or other matter of record from which could be inferred a reasonable probability that the defense could have been sustained. (*Francis v. Independent Electrical Supply Company*, 482.)
2. **TRANSFER—WRITTEN INDORSEMENT NOT ESSENTIAL.**—A formal indorsement or assignment in writing is not necessary to the transfer of a promissory note. (*Shoenhair v. Jones*, 545.)
3. **CONSIDERATION—SURRENDER OF PRIOR UNPAID NOTE.**—The surrender of an unpaid promissory note is sufficient consideration for the making of a new note. (*Id.*)
4. **ASSIGNMENT FOR COLLECTION—WANT OF CONSIDERATION—DEFENSE NOT AVAILABLE.**—In an action on a promissory note assigned for the purpose of collection, the defendant is not entitled to plead that the note was without consideration as against the assignee, where his assignor became the holder of the note in good faith and for value before its maturity. (*Dean v. Game*, 722.)

See *Corporation*, 5, 6.

PROSTITUTION. See Police Power.**PUBLIC LANDS.**

1. **RECOVERY OF POSSESSION—ADVERSE DECISION OF LAND DEPARTMENT—ATTACK FOR EXTRINSIC FRAUD.**—Where in an action to recover the possession of public land based upon a certificate of entry issued by the register and receiver of the land office, the defendant in addition to alleging adverse possession at the date of the inception of the claim upon which the plaintiff's certificate of entry was founded, alleged a contest between them and a determination therein adverse to the defendant, he cannot attack the decision of the Land Department upon the ground that the plaintiff testified falsely in such contest. (*Elliott v. Robbins*, 577.)

PUBLIC LANDS (Continued).

2. **ADVERSE POSSESSION — PRIMARY EVIDENCE OF OWNERSHIP OVERCOME.**—While a certificate of purchase and of location of public lands is primary evidence that the holder or assignee of such certificate is the owner of the land described therein, this evidence may be overcome by proof that at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims. (Id.)
3. **DECISIONS OF LAND DEPARTMENT — EFFECT OF.**—The decisions of the officers of the Land Department on questions of fact upon evidence tending to prove the same, are conclusive upon third persons, at least in the absence of fraud or imposition practiced upon them. And if fraud is practiced upon them, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties affected by their decisions. (Id.)
4. **ATTACK UPON LAND DECISION FOR FRAUD — RULES GOVERNING.**—Where a decision made by the officers of the Land Department in a contest of conflicting claims concerning land entries is attacked upon the ground of alleged fraud in obtaining the same, the right to make such attack is governed by the same principles which control in testing the validity of the ordinary judgments of courts. (Id.)

PUBLIC OFFICERS. See *Office and Officers.*

QUIETING TITLE.

1. **PURCHASE OF PROPERTY — NOTICE OF TRUST — TITLE ACQUIRED.**—Where in an action to quiet title it is shown that the defendant when she received her deed to the property had notice that her grantor, if he had any title whatever to the property, had nothing more than the bare legal title, which was necessarily a title held in trust for plaintiff, who then owned the entire beneficial interest, the defendant, if the title vested in her at all, received it upon the same trust and subject to the same unconditional obligation to convey to the plaintiff. (*Crouse-Prouty v. Rogers*, 246.)
2. **DECREE QUIETING TITLE — ORDERING OF CONVEYANCE.**—Where in such an action it is determined that the legal title to the property is vested in the defendant subject to an unconditional obligation to convey to the plaintiff, it is not prejudicial error to decree a quieting of the plaintiff's title without ordering the execution of a conveyance. (Id.)
3. **PURCHASE OF LOT FROM CORPORATION — REPRESENTATIONS OF OFFICER AS TO TITLE — ESTOPPEL.**—Where a lot was purchased from a corporation, and its president and secretary represented to the purchaser that the deed to be delivered to her by the corporation would convey to her a good and perfect title to the lot, and she

QUIETING TITLE (Continued).

believed those representations and relied upon them without making inquiry, making payments partly in cash and partly by note secured by mortgage on the lot, the corporation is estopped from denying her ownership, notwithstanding such officer acted in good faith, and made no misrepresentations as to the title, and the purchaser had constructive notice of the condition thereof. (Id.)

4. STATUTE OF LIMITATIONS.—An action to quiet title is not barred by the provisions of section 318 of the Code of Civil Procedure, which provides a five-year limitation for the recovery of real property, where the plaintiff was seized of the property at all times down to the time when the action was begun and defendant held the legal title in trust for plaintiff, and there had not been any repudiation of the trust. (Id.)

5. EXECUTION OF DEED—INCONSISTENT FINDINGS.—In an action to quiet title a finding that the plaintiff "executed" a deed to the property is inconsistent with a finding that it was understood that the deed should not be delivered until her last illness, as the term "executed" includes delivery under section 1933 of the Code of Civil Procedure. (Worthley v. Worthley, 473.)

6. DEED FROM MOTHER TO SON—FRAUDULENT REPRESENTATIONS—UNSUPPORTED FINDINGS.—A finding that a deed made by a mother to her son was procured by the latter's false representations that the former should have a life estate in the property, and that she would not lose her interest therein, is not supported by her testimony that she delivered the deed because she was ill and afraid of him, where she also testified that he was to have the property after her death, and it appeared from other evidence that the son had contributed a part of the purchase price. (Id.)

RAILROAD. See *Eminent Domain; Negligence*, 7, 8, 20-22.

RAPE. See *Criminal Law*, 63-78.

RESCISSION. See *Cancellation*, 2; *Corporation*, 14-17; *Sale*, 8.

SALE.

1. WRITTEN CONTRACT—MERGER OF ORAL NEGOTIATIONS.—A person buying or agreeing to buy personal property, the terms of which purchase or agreement to purchase are put in writing, is bound as to the terms of the contract by such writing, into which all preliminary understandings and assurances are presumed to be merged, and such person cannot go behind such writing to avoid the agreement of purchase for the alleged breach of some oral understanding or guaranty not contained within its written terms. (Tockstein v. Pacific Kissel Kar Branch, 262.)

SALE (Continued).

2. **CONTRACT PROCURED BY FRAUD—RULE INAPPLICABLE.**—The application of the principle that all preliminary oral negotiations are presumably merged in a written contract for the sale of personal property does not operate to prevent a person from avoiding a contract for fraudulent representations which operate as the inducement for entering into it, and upon which the party injured or misled was entitled to rely. (Id.)
3. **CONTRACT FOR PURCHASE OF AUTOMOBILE—RESCISSON—FRAUD—EFFECT OF WRITTEN RECITALS.**—The purchaser of an automobile under a written contract which provides that the vendor is not to be bound by any agreements not specified therein, cannot rescind the contract and recover the payments made, on the ground that the sales agent of the vendor misrepresented the character of the machine. (Id.)
4. **SALE OF BUSINESS—AGREEMENT TO REFRAIN FROM CARRYING ON SIMILAR BUSINESS—ENFORCEMENT—RIGHTS OF SUCCESSIVE ASSIGNEES.** Under a liberal construction of section 1674 of the Civil Code, which provides that one who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, the assignee of an assignee of a purchaser of the goodwill of a business is as much entitled to protection under such an agreement as his predecessors in interest, and may maintain an action to enjoin the vendor from violating the agreement. (Graca v. Rodrigues, 296.)
5. **GOODWILL OF BUSINESS—SALE AND TRANSFER.**—Goodwill is an important and valuable incident to a business which the law recognizes and protects, and it may be sold with the business and assigned through successive transfers without limit. (Id.)
6. **CONTRACT—SALE OF STANDING TIMBER—TIME FOR REMOVAL.**—Under a contract for the sale of growing timber which provided that the cutting and removal should be completed within five years from the commencement thereof, and in no event later than July 1, 1915, at which time the premises were to be surrendered to the owner, the purchaser, where operations were begun and suspended, had not the right to resume operations after the expiration of five years from the time of such suspension, although such attempted resumption was prior to July 1, 1915. (Call v. Jenner Lumber Company, 310.)
7. **TIME FOR REMOVAL OF TIMBER—PROVISION IN CONTRACT—CONDITION OF SALE.**—A provision in a contract for the cutting of standing timber that the cutting should be completed within five years, and in no event to be carried on beyond a given date, is a condition of the sale, and not a covenant to remove the timber, and the purchaser

SALE (Continued).

can only take so much of the timber as he may cut and remove within the specified time. (Id.)

8. **SALE OF LUMBER—ACTION FOR PRICE—EVIDENCE—CUSTOM.**—In an action to recover judgment for an amount alleged to be due on a shipment of lumber before the expiration of the sixty-day period allowed under a custom prevailing in the lumber business, the notoriety of a custom supplementary thereto to the effect that if a buyer is sued by any creditor on any account before the expiration of such period the bill immediately becomes due, is sufficiently shown to impute to the defendant a knowledge of its existence by evidence that the custom was in general usage and effect in the lumber trade in this state at the time of the sale, and that it was then commonly known and recognized among lumber dealers. (Officer v. Avery Mill and Lumber Company, 719.)
9. **CONDITIONAL SALE — EXECUTION OF CONTRACT — FRAUD — PLEADING —ANSWER—INSUFFICIENT STATEMENT.**—In an action to obtain judgment for the unpaid balance due upon a written contract of conditional sale of a piano, the answer is insufficient as a statement of a defense grounded upon fraud, where it is alleged that the contract was signed under "false and fraudulent representations," that its execution was a mere matter of form, but no denial made that it was seen and read over before its execution. (George J. Birkel Company v. Lovell, 744.)
10. **EVIDENCE — ORAL NEGOTIATIONS — WHEN INADMISSIBLE.**—Where no mistake or imperfection in a writing is put in issue by the pleadings, and there is no ambiguity in the writing, or question of construction or interpretation of its terms involved, parol evidence of the oral negotiations which preceded the signing are inadmissible. (Id.)
11. **ACTION FOR GOODS SOLD—PAYMENT—ISSUE—FINDING.**—In an action for goods sold and delivered, where the complaint fails to allege that the defendant agreed to pay the alleged reasonable value of the goods, and the answer affirmatively alleges that the goods were sold for an agreed price, the defendant is entitled to a finding on that issue, and a finding that plaintiff's claim is due "upon an open book account" is not sufficient. (Preston v. Dunn, 747.)
12. **EVIDENCE — ERRONEOUS ADMISSION OF LEDGER — ADMISSIONS—ERROR CURED.**—In an action for goods sold and delivered, error in admitting in evidence a ledger purporting to show the account, is not prejudicial, where the sale and delivery of the goods were admitted, and the reasonable value of the goods proved to be the same as the sum charged. (Id.)

See Agency, 3, 4, 6; Attachment; Pledge, 3; Vendor and Vendee.

SCHOOL DISTRICT. See Mechanic's Lien, 6, 7.

SCHOOL LANDS.**SCHOOL LANDS—PURCHASE UNDER ACT OF 1868—FORFEITURE—DECISION**

UPON AUTHORITY.—In this action, wherein the plaintiff sought and secured a judgment quieting his title to certain lands claimed to be owned by him under a certificate of purchase of state school lands issued to his assignor in the year 1869, it is held that the judgment and order denying a new trial must be reversed upon the authority of *Aikins v. Kingsbury*, 170 Cal. 674, which involved identical issues. (Lake v. Sterling Development Company, 48.)

SHERIFF.**UNEXECUTED PROCESS AT EXPIRATION OF TERM—DUTY OF SUCCESSOR—**

MANDAMUS.—Under the provisions of section 4171 of the Political Code, process remaining with a sheriff unexecuted at the expiration of his term of office is to be executed by his successor, and *mandamus* will not issue to compel the outgoing sheriff, after the expiration of such term, to complete the execution of partly executed process. (Bailey v. Baker, 452.)

SPECIFIC PERFORMANCE.**1. AGREEMENT CONCERNING LAND PATENT—NATURE OF INSTRUMENT—**

CONTRACT OF SALE—BAR BY LACHES.—An agreement between conflicting claimants for a patent to certain mineral lands that an action pending to determine the right to the lands should be dismissed and that the defendant should proceed to obtain the patent, and that when obtained a conveyance should be made to the plaintiff of a portion of the lands, does not create an express trust against which the statute of limitations does not run until the refusal to convey, but is in effect a contract for the conveyance of land, the right to specifically enforce which is barred by laches, where no demand for a deed or action is commenced to enforce the contract until eight years after the obtaining of the patent. (Grotfend v. May, 321.)

2. CONTRACT FOR PURCHASE OF REAL ESTATE—OSTENSIBLE AGENCY.—

Where in entering into a contract for the purchase and sale of real estate the purchaser had no actual notice that the person with whom he was contracting was not the actual owner of the property, and did not at any time during his dealings with such person believe, or have cause to believe, that the latter was acting or purporting to act as the agent for the real owner, he cannot specifically enforce the contract against the owner on the theory of ostensible agency, since it is the rule that he who seeks to charge a supposed principal with the obligations resulting from the acts and conduct of an alleged ostensible agent must show that he himself was cognizant of the facts which gave color to the alleged ostensible agency, and caused him to believe that the person he dealt with was acting

SPECIFIC PERFORMANCE (Continued).

in the capacity of an agent rather than as a principal. (*Luft v. Arakelian*, 463.)

3. **ASSUMPTION OF OBLIGATIONS INCURRED BY AGENT—INSUFFICIENT RATIFICATION.**—The fact that the owner, while repudiating the acts and conduct of the alleged agent, offered in one or two instances to assume some of the smaller and comparatively inconsequential obligations incurred by the alleged agent under similar contracts, did not constitute a ratification of the contract. (*Id.*)

STATE LANDS. See **School Lands.**

STATUTE OF FRAUDS. See **Agency**, 7.

STATUTE OF LIMITATIONS.

MONEY BORROWED BY DIRECTORS FROM CORPORATION—REPAYMENT UPON ACCOMPLISHMENT OF PURPOSES OF LOAN.—Where money belonging to a corporation is borrowed by two of its directors for certain purposes upon an agreement to repay the same when the purposes should be accomplished, and the corporation ratifies the transaction, the statute of limitations does not commence to run against the corporation's right to recover the money from the time the money was obtained, but from the time that the purposes were accomplished. (*Pleasant Valley Hotel Co. v. Henderson*, 76.)

See **Contract**, 4-7; **Criminal Law**, 58; **Quieting Title**, 4; **Specific Performance**, 1; **Surety**; **Trust**, 2.

STOCK AND STOCKHOLDERS. See **Corporation**.

STREETS, ROADS, AND HIGHWAYS. See **Municipal Corporations**, 3, 4.

SUBPOENA. See **Deposition**, 3, 4.

SUMMONS.

1. **SERVICE OF COPY OF COMPLAINT—JURISDICTION.**—Under the provisions of section 410 of the Code of Civil Procedure, the service of a copy of the complaint with the summons is essential to give the court jurisdiction. (*McGinn v. Rees*, 291.)
2. **VARIANCE BETWEEN COMPLAINT AND COPY SERVED—MINOR DIFFERENCES—DEFAULT JUDGMENT—JURISDICTION—VACATION OF JUDGMENT UNWARANTEED.**—The setting aside of a default judgment for want of jurisdiction on the ground that the defendant was not served with a copy of the complaint on file in the action, as required by section 410 of the Code of Civil Procedure, is unwarranted, where there existed only minor differences between the complaint

SUMMONS (Continued).

on file and the copy served, the most important of which was the omission from the copy of one of the names of the defendants contained in the filed complaint, and the summons served contained the omitted name. (Id.)

- 8. REMEDY OF DEFENDANT.**—Under such circumstances, if the defendant desired to test the sufficiency of the service, she should have appeared and by an appropriate motion raised the question, instead of waiting until judgment was taken against her and then claiming it was a nullity because of such differences. (Id.)
- 4. SETTING ASIDE SERVICE OF SUMMONS—PREJUDICE OF SUBSTANTIAL RIGHTS.**—A motion to set aside the service of a summons will be denied unless it is shown that the substantial rights of the defendant are affected. (Id.)
- 5. AMENDMENT OF RETURN OF SUMMONS—SERVICE ON DEFENDANT SUED UNDER FICTITIOUS NAME—JUDGMENT.**—Where a complaint names fictitious defendants, and process is served upon a person not named in either the complaint or summons, and default judgment is entered against the person so served, without amendment, it is the duty of the court to permit the plaintiff thereafter upon motion to amend the return of proof of service of summons so as to make it show that the person served was the person sued under the fictitious name. (Id.)
- 6. DEFENDANT SUED UNDER FICTITIOUS NAME—JUDGMENT—FAILURE TO SUBSTITUTE TRUE NAME—IRREGULARITY—APPEAL.**—Where a defendant is sued under a fictitious name and served with process, the failure to amend the complaint so as to state his true name, is but an irregularity for which the judgment against him may be reversed on appeal. (Id.)
- 7. MOTION TO AMEND RETURN OF SUMMONS—GROUNDS NOT STATED—FAILURE TO OBJECT—APPEAL.**—Where a motion to amend the return of summons fails to state the grounds upon which the motion was based, and no objection to the hearing of the motion is made on that ground, the objection cannot be made for the first time on appeal. (Id.)

SURETY.

SURETYSHIP—BOND FOR PERFORMANCE OF DUTIES OF SALES AGENT—SETTLEMENT OF SHORTAGE UNKNOWN TO SURETIES—FRAUD—STATUTE OF LIMITATIONS.—Where the sales agent of a book selling and distributing corporation, who had given a bond for the faithful performance of his duties, upon becoming indebted to the corporation in a considerable sum of money, made a settlement with the corporation without the knowledge of the sureties on the bond, by turning over to the corporation certain securities, and later it was discovered that the securities had been embezzled by such agent and

SURETY (Continued).

the corporation lost the benefit of them, such fraudulent acts of the agent did not extend the time to sue the sureties on the bond, and an action brought more than four years after the obligation to pay the money arose is barred by the statute of limitations. (*Rudin v. Rea*, 665.)

See Justice's Court.

TAXATION.

1. **QUIETING TITLE—VOID TAX DEED—CONDITION OF RELIEF—REIMBURSEMENT OF PURCHASER AT TAX SALE.**—Where the owner of property comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which will in effect invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, or his grantee or assignee, the taxes, penalties, interest, and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession, regardless of the fact that the assessments and levies of taxes were void on account of numerous defects and irregularities. (*Squires v. Estey*, 287.)
2. **RIGHT OF REIMBURSEMENT—EQUITY.**—The right of the purchaser of a tax title upon his deed being declared invalid to recover the amount paid out by him for taxes, penalties, costs, interest, and charges, rests upon equitable principles, and is not dependent upon section 3898, subdivision 5, of the Political Code, as amended in 1913. (*Id.*)
3. **ASSESSMENT—INSUFFICIENT DESCRIPTION—CONFLICTING MAPS.**—An assessment of lots for the purposes of taxation as lots 1, 2, and 3 in block 132 of the town of Bakersfield, without reference to any map, is void for insufficient description, where it is shown that there is but one block 132, and three recorded maps of the town, upon each of which the lots are delineated in different parts of the block. (*Houghton v. Kern Valley Bank*, 496.)
4. **PURPOSES OF DESCRIPTION.**—The purposes to be subserved by the description are to enable the owner to discharge his land from the lien of the assessment by paying the same, and also, in case the land shall be sold to satisfy the lien, that bidders may know what land is offered for sale, and that the purchaser may receive a sufficient conveyance. (*Id.*)

TENDER. See Landlord and Tenant, 20, 21.

TRUST.

1. **CONSTRUCTIVE TRUST—BREACH OF PROMISE TO CONVEY REAL PROPERTY.**—Where a wife being severely ill and not expecting to live makes a deed of gift of real property to her husband upon his express oral promise that he would in turn execute a deed of gift of the property to a niece of the former husband of the grantor and place the same in escrow to be delivered upon his death, his failure, to perform his promise impresses the property with a constructive trust in favor of the niece. (*Hillyer v. Hynes*, 506.)
2. **ACTION TO ENFORCE PROMISE—STATUTE OF LIMITATIONS.**—An action to enforce such a promise is one to recover real property and is therefore subject to the five year limitation provided by section 318 of the Code of Civil Procedure. (*Id.*)
3. **FOLLOWING OF FUNDS—RIGHT OF EQUITABLE OWNER.**—The equitable owner of trust funds may follow them into the hands of all persons who acquire them with notice of the trust. (*Keeney v. Bank of Italy*, 515.)
4. **MINGLING OF TRUST FUNDS WITH INDIVIDUAL MONEYS—PRESUMPTION.**—Where a trustee has mingled trust funds with his individual moneys, drawing upon the aggregate from time to time, it will be conclusively presumed both against him and his creditors and persons claiming under him, that the residue thereof is attributable to the trust so far as may be necessary to keep the money intact. (*Id.*)
5. **BANKING LAW—APPLICATION OF DEPOSIT TO DEBT DUE BANK—WHEN UNAUTHORIZED.**—Where a bank has notice of the equitable rights of a third person in money derived from a check deposited to the account of one of its depositors, it is not at liberty to apply it in satisfaction of an individual indebtedness of the depositor to the bank. (*Id.*)
6. **DEPOSIT OF CHECK—FORM OF INDORSEMENT—FORM OF ACCOUNT—CONSTRUCTIVE NOTICE OF TRUST FUNDS.**—Where a depositor carried an account with a bank under the designation "H. P. Platt, Trustee," which he used generally, depositing therein his own funds and any others he might receive as agent or trustee for other persons, and such practice was known to the bank, the deposit of a check bearing the indorsement "Pay to H. P. Platt, agent, or order," was sufficient to put the bank upon inquiry as to the rights of third parties in the money represented by the check; and the form of the account also placed upon the bank the duty of inquiring as to the rights of third persons in the funds composing the account before it could appropriate them in payment of a debt due the bank from the depositor. (*Id.*)
7. **NATURE OF TRANSACTION—CONSTRUCTIVE NOTICE TO BANK NOT AVOIDED BY.**—Assuming that the deposit of a check made payable to a depositor as agent and transferred and credited to his account

TRUST (Continued).

constituted a sale of the check to the bank, such view of the transaction would not avoid the effect of constructive notice to the bank given by the form of the check, for its proceeds when placed to the credit of the account equitably belonged to the depositor's principals, of which the bank had the same notice as of their rights in the check itself. (Id.)

8. PURCHASE OF REAL PROPERTY—PAYMENT OF CONSIDERATION BY ANOTHER—AGREEMENT NOT TO SELL OR ENCUMBER—VALIDITY NOT AFFECTED.—The trust which is presumed to result under section 853 of the Civil Code where a transfer of real property is made to one person, and the consideration therefor is paid by or for another, is of necessity one by which the grantee would be bound not to sell or encumber the property to the injury of the person for whose benefit the trust was presumed to arise; and the mere fact that the parties had understood or agreed that such would be the effect and terms of the trust relation would not in any way militate against the creation or validity of the trust. (Milloglav v. Zacharias, 561.)

9. TRANSFER OF REAL PROPERTY—AGREEMENT TO SUPPORT—BREACH—RESULTING TRUST.—Where a confidential relationship exists between two persons and one of them purchases real property and causes it to be conveyed to the other upon the agreement that the latter would care for, support, and maintain the former for the balance of his natural life, and thereafter the latter refuses to carry out the agreement, a resulting trust arises in favor of the former. (Id.)

10. CHANGE OF FORM OF SAVINGS BANK ACCOUNT.—Where a depositor in a savings bank in carrying out her repeatedly expressed desire to so arrange her account that her sister with whom she had lived, and who had taken care of her in her invalid condition for many years, might, during their joint lives, draw on the account and receive the residue upon death without probate, handed the pass-book to her niece with instructions to take it to the bank and have the account changed in such a manner as to carry out her desires, and the bank, after being directed in writing by the depositor to add the sister's name to the account, entered the account in the book as subject to the check of either or the survivor of them, and the book was thereupon returned to the depositor, who, after examining it, expressed herself as greatly satisfied with the change, a trust was thereby created in the deposit for the benefit of the sister. (Williams v. Savings Bank of Santa Rosa, 655.)

11. RIGHT TO DEPOSIT UNDER BANKING ACT.—Such a case also comes within the purview of section 16 of the Bank Act of March 1, 1909 (Stats. 1909, pp. 86-90), as amended in 1911 (Stats. 1911, p. 1003), making such persons joint owners in the deposit with the right of survivorship. (Id.)

TRUST (Continued).

12. CHANGE OF FORM OF SAVINGS BANK ACCOUNT.—Where a depositor in a savings bank in carrying out her long existing intention to so arrange her account that both she and her sister, with whom she had lived and who had taken care of her in her invalid condition for several years, might separately draw upon it, and upon her death the balance become the property of the sister without the formalities of probate proceedings, signed a card, at the request of the bank, providing that the two might draw on the account, but which said nothing as to the right of the survivor to the balance of the deposit, and after the card was returned to the bank expressed herself as satisfied with the transaction, a trust was thereby created in the deposit in favor of the sister, where it was shown that the card signed was the form then in use by the bank in making deposit accounts in the name of more than one person subject to the check of either and balance payable to survivor. (Williams v. Union Trust Savings Bank of Santa Rosa, 659.)
13. CONSTRUCTIVE TRUST—CONVEYANCE OF REAL PROPERTY—ORAL PROMISE TO HOLD IN TRUST.—Where a person being on her deathbed and desiring that her property should be devoted to the maintenance and support of her grandchildren, and having the fullest confidence in the integrity of her son, executes and delivers to him a deed absolute in form to the property upon his oral agreement that he would hold the property in trust for the benefit of such grandchildren, and for the purposes specifically to be set forth in a declaration of trust to be thereafter prepared and signed by him, a constructive trust is created in favor of such grandchildren. (Willats v. Bosworth, 710.)
14. DECLARATION OF TRUST—DEFINITENESS AS TO TERMS.—A written declaration of trust drawn by the trustee himself, is not void for indefiniteness, where the fact that it is intended to be such a declaration clearly appears, the beneficiaries named, the property described, the duties of the trustee in collection of rents and care of property defined, and the distribution of the proceeds of the property in event of its sale provided for. (Id.)

See Quieting Title, 1, 2; Specific Performance, 1.

TUBERCULOSIS ACT. See County, 1, 2.

VENDOR AND VENDEE.

1. AGREEMENT RELATING TO REAL PROPERTY—OPTION TO PURCHASE.—A written agreement relating to real property, reciting that the owner had received from the other party thereto a certain sum of money as part payment for the property, followed by a statement of the price and manner of payment, constitutes an option and not an agreement of sale, and such party is not, upon default, entitled to the return of the money paid, where it is further recited in the

VENDOR AND VENDEE (Continued).

writing that it is distinctly understood that the instrument is an option exclusively, and that the owner in the event the first payment is made will "execute a good and sufficient agreement of sale," but if not paid, the money shall be retained as "liquidated damages." (Compton Land Co. v. Vaughan, 130.)

2. CONTRACT OF SALE—RESTRICTION AGAINST SALE OF INTOXICANTS—FORFEITURE FOR BREACH.—A vendor under a contract for the sale of real property is not estopped from enforcing forfeiture of the interest acquired by the vendees under the contract for breach of a condition providing against the sale of intoxicating liquors on the premises, because it accepted payment of money on account of the contract price after breach, where it at the time of such acceptance had no knowledge of the breach. (Southern Pacific R. R. Co. v. Blaisdell, 243.)

3. CONTRACT FOR PURCHASE—FAVORABLE REPORT OF ATTORNEYS—CONSTRUCTION.—A clause in a contract for the purchase of real property calling for a favorable report from the attorneys for the purchaser is not to be construed to mean that the obligation of the purchaser was dependent, upon a mere arbitrary, capricious, and whimsical rejection of the title. (Karahadian v. Lockett, 411.)

4. BROKER'S COMMISSIONS—SALE OF REAL ESTATE.—A broker employed to sell real estate is entitled to his commissions where the purchaser procured by him enters into a valid and enforceable contract to purchase, and the fact that the contract contains a clause making the purchase conditional upon the approval of the title by the purchaser's attorneys does not have the effect of making the contract merely an agreement for an option to purchase rather than a completed contract of purchase and sale. (Id.)

5. DAMAGES FOR BREACH OF CONTRACT—MATERIAL ALTERATIONS AFTER EXECUTION—SUFFICIENCY OF EVIDENCE.—In an action to recover damages for the breach of an alleged contract for the sale of real estate, a finding that the defendant entered into the alleged contract, which was attached as an exhibit to the complaint, is unsupported, where it is shown that it was materially altered after its execution, without the defendant's knowledge or consent, by the insertion therein of the purchase price of the property in both letters and figures and the addition of a clause relating to the prorating of the taxes and insurance on the property. (Johnson v. Cordes, 619.)

6. RIGHT TO ATTACK DUE EXECUTION OF CONTRACT—AMENDMENT OF ANSWER AT TRIAL—DISCRETION.—In such an action the failure of the defendant to attack the integrity or due execution of the contract in his original answer did not deprive him of the right to make such attack at the trial by amendment to his answer, as the matter of such amendment rested in the sound discretion of the trial court. (Id.)

VENDOR AND VENDEE (Continued).

7. **ALTERATION OF INSTRUMENT — TRIAL OF ISSUE — PROCEDURE.**—The time when proofs shall be presented upon an issue as to the validity or admissibility of a writing claimed to have been altered after its execution is a mere matter of procedure during the trial within the regulation of the trial court. (Id.)
8. **CONTRACT OF SALE RESTRICTING SALE OF INTOXICATING LIQUORS — RIGHT TO ENFORCE FORFEITURE — RETURN OF PURCHASE MONEY — INSUFFICIENT REPUDIATION BY VENDOR.**—Where a contract of sale of real property contained a provision that when the deed was made it should include a condition that the premises should never be used as a place of business for the sale of intoxicating liquors, and that the title conveyed should revert to the vendor upon breach of that condition, the vendor, upon a threatened breach of such condition, is not deprived of his rights to enforce a forfeiture of the vendee's rights under the contract, by the return to the vendee of the balance of the purchase price, which had been paid before due, as the vendor was not obliged to receive payment, and was justified in declining to proceed until it could be assured that the purchaser would not carry into effect his threatened violation of his covenants. (Southern Pacific R. R. Co. v. Blaisdell, 239.)
9. **INJUNCTION — FURTHER BREACH — LACK OF PREJUDICE.**—Where the rights of the vendee under such a contract are forfeited, an injunction restraining a further breach is not prejudicial to the vendee, as he has no further right to occupy the premises. (Id.)
10. **BREACH OF CONDITION — RIGHT OF VENDOR.**—Upon such a breach, the vendor may refuse to execute the deed and may quiet his title against the purchaser's claims under the contract. (Id.)
11. **INSUFFICIENT SHOWING OF MONOPOLY.**—The rule that where the owner of the land designed as a site for a town inserts in all deeds made by him a condition against the sale of intoxicating liquors on the land conveyed, solely for the purpose of reserving to himself a monopoly of such business, the condition is void as against public policy and its breach will not work a forfeiture to the estate granted, has no application to such case, where the evidence did not show that there was a design to create a monopoly. (Id.)

See Specific Performance.

VENUE. See Place of Trial.

VITAL STATISTICS. See County, 5.

WITNESS. See Evidence.

WORKMEN'S COMPENSATION ACT.

1. **AWARD FOUNDED UPON CONFLICTING EVIDENCE.**—An award of the Industrial Accident Commission founded upon a fairly substantial

WORKMEN'S COMPENSATION ACT (Continued).

conflict in the evidence will not be disturbed. (Richmond Dredging Co. v. Industrial Accident Commission, 97.)

2. **REDUCTION OF LIABILITY—SURGICAL OPERATION—INABILITY TO PRO-CURE.**—An insurance carrier is not entitled to have an award of compensation made by the Industrial Accident Commission reduced or discontinued on the ground that the injured person refused or declined to undergo a surgical operation which would relieve the disability, in the absence of any showing that he had the means to alleviate his situation, or that the refusal was the result of his own negligence, and where it is shown that he had on two different occasions submitted to an operation with but little, if any, benefit. (Marshall v. Ransome Concrete Co., 782.)
3. **INJURIES FROM NEGLIGENCE—MITIGATION—CARE REQUIRED.**—One who has suffered personal injuries through the negligence or wrongful acts of another is bound to exercise reasonable care and diligence to avoid loss and to minimize the consequences of the injury, and he cannot recover for so much of his damage as results from his failure so to do, but he is not required to take the best care of his injuries, nor to employ the means best adapted to heal them, it being sufficient if he acts in good faith and with due diligence, and exercises ordinary care and reasonable or ordinary prudence. (Id.)

